No. 22465

United States Court of Appeals
For the Ninth Circuit

HOWARD R. KIENLE and DORA J. KIENLE, his wife,
Appellants,

vs.

ALAN BOUD FLACK, an underwriter at Lloyds, London, on behalf of himself and all other Underwriters at Lloyds, London, Subscribing Certificate of Insurance No. 18201 issued by VOIGHT, WALKER & CO., INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

FACTS OF JURISDICTION, RESUME OF PLEADINGS AND PROCEDURAL SYNOPSIS

Review is respectfully sought of appellee-insurer's successful avoidance of liability under a professional errors and omissions policy. The action was brought by appellants as third party judgment creditors of the insured, an escrow agent.

Plaintiffs-appellants, Kienle, husband and wife, and residents of Renton, King County, Washington, brought suit against the appellee insurer, Lloyds, (resident of Kingdom of Great Britian), in the Sup-

erior Court of King County, Washington, seeking payment from appellee, of a state court judgment earlier recovered against appellee's insured, Pacific Farwest Mortgage and Escrow Co. (R. 4). Appellee removed to the U.S. District Court, Western District of Washington, Northern Division, under authority of 28 U.S. Code 1441-1450 inclusive. (R. 1-8). Both amount and diversity were such as to come within the original jurisdiction of the District Courts by virtue of 28 U.S. Code 1331-59 inclusive. (R. 4, 54, 55; Tr. 24). This court is vested with appellate jurisdiction under 28 U.S. Code 1201.

Appellants' complaint generally alleged that Lloyds[1] was an alien insurer who had issued a $100,000.00 escrow agent's errors and omissions policy to its insured, Pacific Farwest Mortgage & Escrow Co., and that said policy covered the $49,247.50 judgment recovered by plaintiffs against the insured in King County Superior Court cause number 630691 and that the defense of the earlier action had been tendered to Lloyds and had been declined. (R. 4, 5).

After removal to district court, and the joinder of an additional party[2], appellee answered by admitting the policy of insurance as well as appellants' judgment against its insured and affirmatively pleaded six defenses. (R. 20-23).

After issues were joined and certain discovery procedures employed, a pre-trial order was entered (R.

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[1]The formal denomination of this defendant was later changed by agreed order. (R. 9).

[2]Although unlikely bed-fellows, it was insisted that the offending escrow agent be joined with appellants as a plaintiff. (R. 11 and 18).

54-82)[3] which was characterized by substantial factual agreement — viewed by all counsel to be of such sufficiency so as to entitle their respective clients to a summary judgment. Both sides so moved. (R. 219, 221). Both motions were denied. (R. 237, 238). The two day trial that followed consisted mostly of re-establishing previously agreed facts.

At the conclusion of trial, the district judge rendered his oral decision in favor of the insurer, (R. 239-242; Tr. 249-252). The sole grounds announced for his decision being that, in the earlier state court action, the insured

> "(1) did not give notice to defendant insurers of the amended complaint which was based upon a new cause of action, and (2) the insured did not furnish the suit papers in the state court action to which papers, under the policy provisions, the defendants were entitled and did request copies of without success. For those reasons the defendants are not bound by the state court judgment." (R. 239-240; Tr. 249-250).

After discussing its reasoning and its reliance upon two cases[4] cited by appellee, the court concluded its oral decision (except for certain post-trial procedural directions to counsel) by saying:

> "The court, from the consideration of and upon such preponderance of the evidence, does find

---

[3]It will be noted that the trial judge did not have the benefit of participation in the pre-trial conferences wherein the several legal issues were informally discussed and formulated. This case was first assigned to the Hon. Wm. J. Lindberg, who held pre-trial hearings on May 19, 1967, and again on May 24, 1967, as shown by the docket entries. (R. 292).

[4]Sussman vs. American Surety Co., 345 F.2d 679, (CA 5th, Fla. 1965) Lawrence vs. Northwest Casualty Co., 50 Wn.2d 282, 311 P.2d 670 (1957)

the issues in this case in favor of the defendants and against the plaintiff." (R. 241; Tr. 251).

Upon the presentation of the Findings of Fact and Conclusions of Law, the court signed the twelve pages of the same as proposed by appellee, modifying them in two particulars which made them more favorable to appellee than as proposed. (R. 249-262). All of appellees's several contentions of law (except one which was not presented[5]) were accepted by the court. Thereafter, appellants' Motion for new Trial or Amendment of Findings was denied. (R. 283-284). This appeal follows. (R. 285-286).

STATEMENT OF THE CASE

In 1964, Pacific Farwest Mortgage & Escrow Co., (hereinafter called "Pacific Farwest" or "the insured"), in the regular course of its escrow business, served as escrow agent in the sale of certain valuable free and clear real property between appellants Kienle as sellers and a certain Northwestern Utilities, Inc., (hereinafter called "Northwestern"), as purchaser. The property consisted of a house located on about eight acres of land near Renton, Washington. Appellants never received a cent from this purported sale and they lost the title to their property as a result of the established fraud of Northwestern. (Ex. 4, Tr. 20).

A multiple-defendant action was brought in state court, and after the default of Northwestern, (whose officers had left the jurisdiction) was entered, trial was had against the remaining defendants. After

[5]The contention that this policy was strict indemnity and indemnified only against actual loss and not against liability.

seven actual days of trial and admission into evidence of over 100 exhibits, the state court judge, the Hon. Lloyd Shorett, determined the role played by each of the several defendants and the legal rights and obligations therefrom emanating, and, accordingly, gave judgment of dismissal for some and damage judgments against others. (Ex. 2, 4, Tr. 19, 20).

One of the defendants against whom liability was imposed was the escrow agent, Pacific Farwest, who is appellee's insured in the present action.

Caught between, on the one hand, insistent and threatening demands by purchaser-Northwestern for release of the deed (Ex. R. 9, Tr. 165, Tr. 193) and, on the other, the admonitions of appellants not to release it (Ex. A-7, Tr. 146; Ex. A-8, Tr. 146), Pacific Farwest succumbed to Northwestern's pressure, and, after deciding it was within its legal rights as an escrow agent to release the deed (Tr. 157, 167-168)[6], it did release it.[7] Specifically, the state court found, inter alia, that,

> " . . . it was not acting dishonestly or fraudulently, but that, in so doing, it was in error and said act amounted to poor judgment and negligence and a breach of its contract of escrow." (Ex. 4, P. 12-15, Tr. 20).

Judgment was rendered against it. (Ex. 2, Tr. 19). Notice of appeal was given but is was not perfected.

At the time, Pacific Farwest was insured under the

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[6]It will be noted that one of appellee's contentions of law below was that " . . . Pacific Farwest, as escrow agent, was, therefore, legally entitled to deliver the fulfillment deed. . . ." (Pre-Tr. Ord., R. 68, l. 4-5).

[7]Obviously, the fraud of Northwestern would have failed of accomplishment if the insured had retained the deed pending a judicial determination of its rights and duties.

policy here in question, (Ex. 1, Tr. 18), the body of which for the court's convenience is reprinted herein as appendix B.

To accomodate the reader's mindset, we quote the following language pertinent to coverage:

> ". . . Underwriters . . . do hereby agree to indemnify the assured . . . against liability and costs in respect to any claim or claims which may be made against the assured . . . by reason of any negligent act, error or omission whenever or wherever the same was or may have been committed or alleged to have been committed on the part of the assured . . . in or about the conduct of any business conducted by . . . the assured . . . in their (sic) professional capacity as Escrow Agents." (Ex. 1, Tr. 18).

The policy contained only four exclusions:

> "6. This Certificate Does Not Extend To Indemnify the Assured in Respect of Any Claim:
>
> (a) For libel or slander; or
>
> (b) Brought about or contributed to by the dishonesty of the assured or any of their employees; or
>
> (c) Based upon or arising out of an Act of Congress of the United States of America known as the "Securities Act of 1933", approved May 27, 1933, or any amendment thereof or addition thereto; or
>
> (d) Based upon or arising out of any opinion of title on real estate rendered or furnished by the Assured or by any predecessor of the Assured." (See Appendix B, page .....)

The insurer was not under a duty to defend claims

made against its insured but,

> "2. Underwriters, if they so desire, shall be entitled at their own expense to take over and conduct in the name of the assured the defense or settlement of any claim." (Provisos and Conditions No. 2 of Ex. 1, Tr. 18).

The policy contained the following notice and cooperation clause:

> "The Assured shall as a condition precedent to their right to be indemnified under this Certicate give to Underwriters immediate notice in writing of any claim made upon them and further, upon request, shall give to Underwriters such information as Underwriters may reasonably require and as may be in the Assured's power. . . . " (Provisos and Conditions No. 5 of Ex. 1, Tr. 18).

The original complaint filed in the state court action on November 12, 1964[8] (Pre-trial order p. 5a, R. 59) plainly alleged fraud against Northwestern through its officers (Ex. A-20, Tr. 70, See par. III thereof) and alleged that Farwest "prior to and subsequent to the transaction involving plaintiffs' land, the defendant, Pacific Farwest Mortgage and Escrow Co., has been acting in collusion with the defendant, North-Western Utilities, Inc.," (Ex. A-20, Tr. 70, par. IV).

It is not disputed that appellee was given proper notice of this claim and was forwarded a copy of the original complaint. (R. 255, Finding 23; R. 88, LL 11-12). It declined coverage of the claim because (1) collusion with the fraud of Northwestern brought it within the exclusion of par. 6 (b) i.e., "brought about or contributed to by the dishonesty of the as-

[8]Date of service is not shown.

sured or any of their employees." and (2) that this was admittedly an intentional act as the result of a deliberate decision. (Ex. A-26, Tr. 63).

When the complaint was amended on February 3, 1965, wherein additional defendants were joined, the allegations were changed eliminating the allegation of collusion as against the defendant, Pacific Farwest. (Ex. 3, Tr. 19)[9]

More than five months prior to trial of the state court action the insurer's counsel was admittedly notified of this amendment — not by the insured, but by appellants' counsel. (R. 256, Finding 28).

The sole grounds mentioned in the district court's oral decision for denying appellants any relief was that the offending insured had neither given notice of this amended complaint nor had furnished it to his insurer after being requested to so do.[10]

To afford a quick-reference basis upon which to apply the legal principles hereinafter to be discussed, we set forth, largely chronologically, (because sequence is important), nineteen significant facts. We respectfully ask the court to keenly note that, as appellants seeking review, we set forth facts which are either (1) admitted (2) the sworn testimony of ap-

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[9]The dates clearly show that the amendment was in no way prompted by Ex. A-26, the Feb. 15, 1965, letter declining coverage.

[10]The court's own questioning of the insurer's counsel, Mr. Moss, seemed to reflect his feeling that, despite counsel having read paragraph IV of the original complaint, and having been informed that collusion was no longer alleged in the amended complaint, the insurer's counsel (not having been furnished the amended complaint) would not know the basis upon which relief was asked unless told by Mr. Yates. Too, this was a post state-trial conversation of which the court's inquiry was directed. (Tr. 54-55).

pellees's counsel or (3) are factual contentions of appellee.

(1) December 1, 1964, the insured wrote its agent, Wood Insurance Agency, advising of a possible claim under the policy (Ex. 7 Adm. fact 5 of Pre-Tr. Order, R. 60, Finding 23, Tr. 255).

(2) December 5, 1964, insured's agent wrote to Voight-Walker Co., Inc.[11] as follows:

> "We received the enclosed letter from Pacific Farwest Mortgage & Escrow Co., which states a possible claim under the above policy.
>
> Please contact Mr. DeCrane Cooke of Pacific Farwest Mortgage & Escrow Co., for additional information." (Def's. Ans. to Interrog. No. 1, R. 39-40, Ex. 9, Finding 23, Tr. 255).

(3) December 7, 1964, the insured's attorney, Mr. Yates, wrote to Voight-Walker (Ex. A-21, Tr. 70), (enclosing the complaint and the insured's answer),[12] as follows:

> "Enclosed you will find a photostatic copy of summons and complaint in the above case together with a copy of our Answer which was served and filed on behalf of Pacific Farwest Mortgage & Escrow Co., Inc.
>
> As the pleadings indicate, Pacific Farwest Mortgage & Escrow Co., Inc., was acting as escrow and had in its possession a deed which was delivered it by the plaintiffs as sellers under a real estate contract. This deed was to be delivered

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[11]This company is admittedly Lloyd's Statutory Agent in the State of Washington . (Ex. 1, Tr. 18, Finding 23, Tr. 255, l. 24).

[12]The answer was not offered into evidence. We suggest that, upon analysis, it may be quite conclusively inferred that it denied any fraud on the part of the insured.

> to Northwestern Utilities, Inc., as purchaser under the real estate contract, when the purchaser had performed the contract in conformity with its terms. Purchaser performed, in our opinion, in conformity with its terms but the seller didn't want the deed delivered. Suit is commenced by the seller because the deed was delivered."

(4) About a month later, on Jan. 6, 1965, Voight-Walker Co., forwarded copies of Yates' letter, the complaint and the answer prepared by Yates,[13] to Mr. Moss, one of appellee's counsel. (Tr. 68, Finding 24, R. 255).

(5) Upon receipt of the above documents, appellee's counsel, Mr. Moss, telephoned insured's attorney, Mr. Yates. Concerning the conversation, Mr. Moss in part testified:

> "I told him that I didn't think that this claim was covered under the policy, for two reasons: That the complaint clearly alleged fraud, which was concluded by the policy, and I thought this was an intentional act, decision, which was not covered under the policy, but that I would report to the underwriters and see what they wanted to do"[14] (Tr. 59, ll. 1-7).

(6) On February 3, 1965, appellants filed an amended complaint which added additional defendants and wherein the allegation of collusion on the part of Pacific Farwest was eliminated. (Ex. 3, Tr. 19).

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[13]It will be remembered that, under this policy, the insured cannot *demand* a defense by the carrier. (Provisos and Conditions 2, Ex. 1).

[14]The testimony of Mr. Yates was generally in accord (Tr. 82, 91-92) although he felt the intentional nature of the act was most emphasized. The general veracity of Yates was the subject of commendatory notice by the state court judge. (A-29, Tr. 209, p. 7, ll. 1-6, Judge Shorett's Oral Opinion in state court action.)

(7) A few days prior to February 15, 1965, the insurer's attorneys received instructions from the underwriters to deny coverage. (Tr. 35, ll. 21-24; Tr. 38, ll. 10-21).

(8) Following those instructions, Mr. Moss wrote to Mr. Yates on February 15, 1965 the following:

> "On behalf of Errors & Omissions Underwriters of Pacific Farwest Mortgage & Escrow Co., Inc., we respond to your letter of December 7, 1964, to Voight-Walker & Co., Inc., giving notice of the captioned claim and enclosing copies of the pleadings. The complaint against Pacific Farwest Mortgage Co., charges that it acted in collusion with the defendant Northwestern Utilities, Inc., which is otherwise charged with fraud and deceit in the complaint, and to the extent that this charges Pacific Farwest with fraud, such an allegation is excluded by paragraph 6 (b) of the Errors & Omissions Certificate.
>
> "The other allegation of the complaint charges Pacific Farwest with violating plaintiff's instruction in releasing the deed without permission; you have advised that this was an intentional decision by your client and in fact your client secured protection for itself by obtaining a $1500. cash indemnity fund from the purchaser to indemnify your client from any liability that might be incurred by it from releasing the deed. Under the circumstances it is underwriters' conclusion that this claim is not insured by the Errors & Omissions Certificate and underwriters accordingly deny coverage without prejudice to any and all rights accruing to them under the terms of the applicable Errors & Omissions Certificate." (A-22, Tr. 60).

(9) About one month later Mr. Moss closed his file on this claim. (Tr. 39, 60)

Mr. Moss, being cross-examined by co-counsel, Mr. Zilly:

> "Q. Mr. Moss, as I understand it, approximately thirty days after you wrote to Mr. Yates declining coverage, you closed your file; is that correct?
>
> A. Yes."

(10) On May 20, 1965, Mr. McCormick, one of appellants' counsel, (having been furnished a copy of the Feb. 15, 1965 letter declining coverage as an answer to his inquiry of Mr. Yates concerning Farwest's insurance coverage (R. 256, Finding 28)) wrote directly to Mr. Moss as follows:

> "Mr. Orvin H. Messegee and myself represent the plaintiff in the reference matter and we recently received a letter from Mr. Leslie M. Yates, attorney at law, who represents Pacific Farwest Mortgage & Escrow Co., Inc., which apparently has since ceased operations. Mr. Yates furnished us with a copy of your letter to him dated February 15, 1965, wherein you take the position that your client's insurance policy does not cover the instant situation.
>
> Since February 15, 1965,[15], our investigation has led us to believe that your client's insured was not acting in collusion with the defendant, Northwestern Utilities, Inc., and all parties have been served and there is on file an Amended Summons and Complaint reflecting this.
>
> Mr. Messegee and I would be happy to meet with you and discuss the case, and would appreciate at this time your furnishing us a copy of the policy in question.

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[15]This obviously should have been Jan. 15, 1965. It is admitted that the amended complaint dropping any reference to collusion was filed Feb. 3, 1965.

May we please hear from you at your convenience." (Ex. 5, Tr. 21).

There was at no time any response to this letter. (Pre-Tr. Ord. Adm. Fact 17, Tr. 42, 43, 61, Finding 38, R. 259).

(11) On May 24, 1965, Mr. Moss, insurer's counsel, wrote the following letter to Mr. Yates:

"We enclose copy of letter received from attorney McCormick. Please furnish us a copy of all relevant pleadings subsequent to the original complaint and answer, including particularly the amended complaint. Advise also the current status of Pacific Mortgage & Escrow Co., Inc., and whether you intend to continue to defend your client in this case.

We have never been provided with a copy of the earnest money receipt and agreement, the real estate contract, or the escrow instructions and would appreciate your furnishing us a copy of the same; if there were no written escrow instructions please advise.

Underwriters continue to reserve all rights under the applicable Errors & Omissions Certificate." (Ex. A-26, Tr. 63).

There was at no time any response to this letter and the documents therein mentioned were not furnished. (Finding 29, R. 256).

(12) No further effort of any kind was made by insurer's counsel to elicit further information from any source whatsoever until after trial of the state court action. (Tr. 48-54).

(13) During this five month period, no follow up was made to the May 24, 1965 formal letter of request

to insured's counsel. (Tr. 54).

(14) The invitation contained in the letter of appellants' counsel was never accepted nor had a copy of the May 24, 1965 letter (R. 61) been sent to Mr. McCormick (Ex. A-26, Tr. 63).

(16) During the year following entry of judgment in King County Cause No. 630691, appellee took no action to vacate or modify the judgment. (Finding 40, R. 259). (See RCW 4.72.010 et seq., Appendix C, P. .....).

(17) The request by Pacific Farwest's insurance agent that Mr. Cooke, president of the escrow company, be contacted for further information was not heeded. (Tr. 54).

(18) Mr. Yates was never offered to be paid any legal fees by appellee. (Pre-Tr. Ord., Adm. fact 13, R. 61, Finding 34, R. 259).

(19) On or about March 1, 1965, the insured, Pacific Farwest ceased doing business. (Defendant's Contention of Fact No. 8, R. 65, l. 24), and appellee was aware of this (R. 44, ll. 1-4).

SPECIFICATIONS OF ERROR

I.

The court erred in entering judgment dismissing appellants' action.

II.

The court erred in entering its order of August 21, 1967, insofar as it denied appellants' Motion for Summary Judgment.

III.

The court erred in denying appellants' Motion for New Trial and Amendment of Findings

IV.

The court erred in making and entering the following factual findings:

1. That part of Finding of Fact 20 which reads:

> "Pacific Farwest further knew and fully appreciated that there was a likelihood of being sued by plaintiffs if Pacific Farwest delivered the fulfillment deed in violation of the instructions received from plaintiffs' attorney not to release the deed, but Pacific Farwest nevertheless intentionally and wilfully delivered the deed from escrow. The delivery of the deed did not constitute a negligent act, error or omission."

2. All of Finding of Fact 22.

3. Finding of Fact 25 for its failure to enumerate both reasons given by the insurer for declining coverage.

4. That part of Finding of Fact 30 reading:

> "Under the foregoing provision of the insurance Certificate, defendant was entitled to be furnished with the pleadings, documents and information requested by defendants's counsel of Mr. Yates. The determination by Mr. Yates not to respond to counsel's letter of May 24, 1966, (Ex. A-26) or furnish the pleadings, documents as therein requested, was an intentional decision on the part of Mr. Yates."

5. All of Finding of Fact number 31, except for the first sentence thereof.

6. All of Finding of Fact number 32.

7. All of Finding of Fact number 33.

8. All of Finding of Fact number 41.

V.

The court erred in making and entering its legal conclusions numbers 3 through 7.

ARGUMENT OF APPELLANTS

SUMMARY OF ARGUMENT TO FOLLOW

Specifications of Error I, II, and III and Specication of Error V, the latter including all of the court's Conclusions of Law, except numbers 1 and 2, together and in common, involve what appellant contends are basically erroneous concepts of present day insurance law and avoidance of prolixity invites a common discussion which will appear with separate organization under Section I to follow: (Specification of Error IV concerning claimed erroneous Finding of Fact, insofar as any part of such findings are really legal conclusions, (as we contend some are), will not warrant the repetition of the argument in Section 1, which will hopefully cover these issues).

Section I will be sub-sectioned as follows:

A. What are the applicable underlying concepts of Insurance Law?

B. What is the proper construction of "*negligent act, error or omission*" as used in a professional liability policy?

C. Are *intentional* acts excluded from coverage or not included in coverage?

D. What is the required construction of Par. 5 of "Provisos and Conditions"?

E. What are the *purposes* of *notice and cooperation?*

F. When may an insurer avoid liability based on its insured's *failure to cooperate or to give notice?*

G. May insurer *re-litigate* the issue of their insured's liability to appellants?

Section II. will confine itself to Specification of Error number IV insofar as the findings of which complaint is made are deemed to be true findings of fact.

Section III of argument to follow will concern itself with Specification of Errors numbers II and III (Denying Motions for Summary Judgment and New Trial) insofar as error may be based on procedural considerations.

Section IV will simply be the conclusion of argument.

SECTION I

A. What are the Applicable Underlying Concepts of Insurance Law?

Appellee's memorandum in resistance to appellant's Motion for New Trial in the lower court stated:

> "This case has probably been the most thoroughly briefed law suit — on both sides — in which we have participated in our trial practice. . . ."[16]

This may well be true, but we are impelled to most respectfully and earnestly say that we have thus far

[16]The combined briefs of both counsel appear to exceed 130 pages.

sensed a good deal of unused endeavor — and, obviously, the appellants are most hopeful that their counsels' earlier tilling of the law together with a new climate may bring more fruitful results.

Risking the appearance of hyperbole, we must candidly state that we were startled when, after Findings and Conclusions had been signed, it was found that every pellet of appellee-insurer's shot gun blast had precisely found its mark. At the same time, the veteran trial judge cannot be faulted for his most conscientious attitude and his devotion to his judicial role. And we even concede that his decision, erroneous as it may to us appear, might well have been the correct decision in the right historical setting.

But yesteryear's concept of purely technical defenses, throughout the law, and particularly in the field of insurance, is fast eroding under a relentless attack by enlightened courts. "Make-believe" is out — as it should be.

Today's unmistakable trend is to politely discard all purpose-defeating and purely artificial refinements into "the limbo they so heartily deserve", and without damaging the genuine substance of contract law, to so administer the law in the field of insurance as to effectuate desirable social purposes.

The eyes of the law, in dealing with insurance disputes, no longer so intently focus on privity that its peripheral vision loses sight of the innocent third-party victim. Insurers increasingly are finding the business less private. The public has an interest. RCW 48.01.030 (See App. 3).

For our present purposes, what ground rules will

govern such an insurance-avoidance case in this appellate forum?

First and basically it is agreed, of course, that the Erie[17] doctrine applies and the applicable substantive law of the State of Washington governs. Insofar as concerns the district court's denial of summary judgment, it is acknowledged that the sufficiency of the evidence to raise a fact issue "should not be controlled by state law:" *Allen v. Matson Navigation Co.*, (CA 9th 1958) 255 F. 2d 273.[18] Absent any pronouncement of the law on a particular point, this court must use "its best judgment" of what the Washington court would hold. *Tavernier v. Weyerhaeuser Co.*, 309 F. 2d 87 (CA 9th 1962). "Prophetic judgment" may be necessary. *Cooper v. American Airlines*, 149 F. 2d, 355, (CA 2d, 1945).

Appellants are quite mindful of the presumptive correctness of the lower court's findings. At the same time considerable comfort is found in this court's review formula when substantially all of the legally determinative facts are documentary in form or are admitted facts.

> "In determining this point (whether the findings were clearly erroneous) we consider all of the evidence, giving the written evidence the weight we deem it entitled to *de novo,* and applying the oral evidence with 'due . . . regard to the opportunity of the trial court to judge of the credibility of the witnesses.' " *Smyth v. Barne-*

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[17]*Erie Railroad Co. v. Thompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 Ld ed. 1188.

[18]As explained by Prof. James Wm. Moore, this view is in constitutional obedience to Article III and the Seventh Amendment and the Erie doctrine becomes subservient. 5 Moore Fed. Practice, 2d Ed. Sec. 38.10 p. 102. At the same time, no different treatment between the forums would be expected.

son, (CA 9th 1950) 181 F. 2d 143, 144; *Kaufman -Brown Potato Co. v. Long,* (CA 9th 1950), 182 F. 2d 594, 597.

Judge Frank of the Second Circuit elaborately considers the meaning of the "clearly erroneous" qualification for review under FRCP Rule 52 (a) in *Orvis v. Higgins,* (CA 2d 1950) 180 F. 2d 537, 538.

In finding the crucial fact contrary to that found by the trial judge, the majority opinion adverts to the intent of the rule that jury verdicts or administrative findings are necessarily more immune from review than are a trial judge's findings of fact.[19] and states that

> ". . . here the finding is that of a trial judge, and the evidence consists in large part of facts neither side disputes, in circumstances such that the trial judge's evaluation of credibility becomes unimportant."

Specifically respecting contests between insurers and third-party beneficiaries of the insurance contract, it is recognized to be the law that the third party stands in the shoes of the insured. *Van Dyke v. White,* 55 Wn. 2d 601, 349 P. 2d 430.

Insurance contracts will be interpreted in a manner most conducive to affording coverage. All ambiguities will be resolved in favor of the insured. That this is clearly the law of Washington is well recognized by this court. It was quite deliberately determined to be so in *U.S., and others v. Eagle Star Ins. Co., Lm't.,* 196 F. 2d 317, wherein a rehearing was granted in 201

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[19]This distinction was well established by the Supreme Court in *U.S. v. U. W. Gypsum Co.,* (1948), 333 U.S. 364, at 396, 68 S. Ct. 525, 92 L. ed. 746.

F. 2d 764 (1953).[20] The majority opinion stated at 765:

> "The Washington Court adheres to the general rule that policies of insurance are construed in favor of the insured and most strongly against the insurance companies." Citing *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 83 P. 113, 4 L.R.A., N.S., 636; *Green v. National Casualty Co.*, 87 Wash. 237, 151 P. 509, 511.

Decisions of the Washington Court in the fifteen years since, many of which are hereinafter cited in support of more specific points, amply support this court's determination that this state is in the "liberal" school.

B. What is the Proper Construction of "Negligent Act, Error, or Omission" as Used in a Professional Liability Policy?

Appellee has contended, thus far successfully, that this Lloyd's policy insures only against acts which involve *negligence* and that they must be of an accidental or inadvertent type; that if the insured intended to do the act which resulted in harm there can be no coverage. This overlooks the horn-book principle that negligent acts are intentional acts.

In its Findings of Fact, the court found that " . . . Pacific Farwest nevertheless intentionally and wilfully delivered the deed from escrow. The delivery of the deed did not constitute a 'negligent act, error, or omission' ", and again, in its Conclusions of Law, concluded that such delivery " . . . was an intentional and

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[20]Although, upon rehearing, the 196 F.2d 317 decision was reversed, it will be noted that the earlier case reversed the trial court in part whereas 201 F.2d 764 reversed the trial court *in toto*.

wilful act and did not constitute a negligent act, error or omission' within the meaning of the coverage provisions of defendants' Certificate of Insurance." (See Finding 20, R. 254; Conclusion 6, R. 261.)

Of course, earlier, the state court, without any insurance question involved, had held to the contrary —but, because of the lack of notice found in the case, as explained in the district court's oral opinion (R. 239-242), neither the state court's findings nor judgment were held to be binding upon the insurer.

So, reserving the question of sufficiency of notice for present (Sub. sec. E. supra), what would the Washington Supreme Court have ruled in this same situation? We confidently venture that it woud have had little difficulty in holding that, when an escrow agent who has available to him a fool proof alternative, succumbs to the pressure of one of the disputing parties to the escrow transaction and releases from his safekeeping any document as valuable as a deed, over which he is a fiduciary custodian, then his conduct, as a matter of law falls below that of a reasonably prudent escrow agent and *is negligent conduct* —and if harm results, he is liable. We are equally confident that the Washington Court would take the position, in construing the subject policy's coverage clause, that if his belief that he was right[21] could be held to immunize himself from the charge of negligence, then he has still committed an *error*. The Washington Court, just as surely, would hold that when an escrow agent breaches his *contract* of escrow, he has committed error under a professional errors and omissions policy.

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[21]It should be noted that appellee has consistently contended that Pacific Farwest had a legal right to release the deed.

In *Sutherland v. Fidelity and Casualty Co.*, 103 Wash. 583, 175 Pac. 187, an action on a medical malpractice policy, the insurer contended that, although the doctor-insured may not have removed all of his patient's gallstones as he agreed to do, there was no showing of malpractice, the Washington Court said,

> "The words malpractice, error and mistake, as used in this indemnity policy, do not mean necessarily the same thing. If they were so intended, it was an idle thing to insert more than the word malpractice. A physician may err or make a mistake without being guilty of malpractice. This policy covers malpractice. It covers error, and it covers mistake in the practice of appellant's profession; and if liability flows from either, and he is required to pay damages on that account, we think it is plain that the policy here undertook to insure against such mistake or such error, as well as against malpractice. The words "liability imposed by law" clearly refer to a judgment recovered on account of malpractice, error or mistake, and do not limit the policy to cases where there was simply malpractice, where the physician is required to use care, diligence and such skill as is ordinarily possessed by the average members of the profession in good standing. The judgment in the Schuster case was a liability fixed by law. This liability resulted from an error or mistake of the appellant in his treatment of Mr. Schuster. The mere fact that appellant had a special contract to remove all of the gallstones from Mr. Schuster did not affect the insurance policy, because it was a contract made in the practice of appellant's profession and one which he clearly had a right to make."*[22]

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[22]Mr. Rowland H. Long, former vice-president and general counsel for the Massachusetts Mutual Life Insurance Co., in his treatise on "The Law of Liability Insurance", in Vol. II at the end of Sec. 12.15 extends kudos to the Washington Court for its construction of the policy in the Sutherland case.

Applying the same interpretative concept to hold *for* the insurer, the Washington Court ruled that injury caused by collapse of a treatment table came within the exclusion of a general premises liability policy which excluded injury resulting from "any malpractice, error, negligence or mistake committed by any person in the performance or omission of professional services." *Harris vs. Fireman's Fund*, 42 Wn. 2d 655, 257 P2d 221. The subject contract of insurance must be presumed to have been entered into in the light of existing Washington decisional law. 17 Am. Jur. (2d) Contracts, Sec. 257, p. 654.

The above cases are simply obedient to the well known rule of construction that language will be considered to have been meaningfully used. As stated in 17 Am. Jur. (2d) Contracts, Sec. 259, p. 661:

> "So far as reasonably possible, effect will be given to all the language, and to every word, expression, phrase and clause of the agreement. No word or clause should be rejected as mere surplusage if the Court can discover any reasonable purpose thereof which can be gathered from the whole instrument."

Moreover, where the expression "negligent act" has a definite legal meaning quite different from "error", the established legal meanings should attach. 17 Am. Jur. (2d) Sec. 249, p. 642. Even apart from legal usage, the words in ordinary usage have distinctive meanings. See *Burns v. American Casualty Co.*, 273 P2d 605 (Cal. 1954) and Webster's New Twentieth Century Dictionary, 2nd Ed.

In addition to the foregoing, even if the language were ambiguous, the Court would be obliged to interpret it in a manner most favorable to plaintiff—this,

even though the Court were to believe that Lloyd's intended the contrary. Ames v. Baker, 68 Wash. 2d 713, 415 P2d 74.

That Lloyd's may have in fact not intended to afford coverage for acts such as committed by Pacific Farwest in this case makes utterly no difference.

In *Sears Roebuck & Co. v. Hartford*, 50 Wn 2d 443, 313 P2d 347, we read:

> "That Sears received a greater coverage than Rockey was obligated to furnish, and than Hartford intended to give, is not a matter with which we are here concerned. Since an insurance policy is merely a written contract between an insurer and the insured, courts cannot rule out of the contract any language which the parties thereto have put into it; cannot revise the contract under the theory of construing it; and neither abstract justice nor any rule of construction can create a contract for the parties which they did not make for themselves. Jefferies v. General Cas. Co. (1955), 46 Wn. (2d) 543, 283 P. (2d) 128; *Evans v. Metropolitan Life Ins. Co.* (1946), 26 Wn. (2d) 594, 174 P. (2d) 961
>
> We have but recently, in a case involving much greater hardship on the insurance company, and under circumstances where the evidence dehors the policy clearly demonstrated a specific intention not to cover the risk in question, held that the insurance company was bound by the terms of the policy it had issued. *National Indemnity Co. v. Smith-Gandy, Inc.*, (1957), ante p. 124, 309 P. (2d) 742, See, also, Laws of 1947, chapter 79, Sec. .18.19, p. 366 (cf. RCW 48.18.190)." p. 449.

Courts quite rightly at times ask: "What *does* this policy insure against?" And so here, what risks *were*

being assumed by Lloyds when it accepted hundreds of dollars as a premium?—that someone might upset an ink-bottle and obliterate a signature?—that a window might negligently be left open so that a deed might blow away? The escrow company's premises policy would cover risks of tripping over telephone cords, or falling from collapsing chairs. The instant policy *limited* the coverage to negligent acts, or errors, or omissions which would be *peculiar* to the escrow business. Again the actual words are,"...*only in their professional capacity as ESCROW AGENTS.*" (Ex. 1, App. B.)

If one were to ask the average person, "Why would an escrow agent want a $100,000.00 errors and omissions liability policy?" he would likely reply with the obvious answer, "I suppose he would want it in case he released someone's deed or paid out someone's money and it turned out that he shouldn't have."[23]

The Washington Court, as do most, strives to *find* —not defeat—coverage. Indeed, it has placed quite *different* constructions on *identical* language dependent upon whether by so doing coverage would be afforded or denied.

This is commented upon in a law review discussion of *Brown v. Underwriters at Lloyds,* 53 Wn 2d 142, 332 P2d 228 (1958), wherein our court found coverage for a loss resulting from the previously proved misrepresetation of a real estate broker. Of course, there, the court was considering the word "fraudulent" as

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[23]Of course he might also want such coverage for other risks, . . . and also as an advertisable assurance to the public. It will be noted at the bottom of Ex. 8, (Tr. 29), the insured's stationery bore the words "Bonded and Insured".

used in an exclusionary clause, the broker having falsely represented something believed by him to be true. The trial judge's holding, that the loss was excluded from coverage, was reversed.

> "Courts generally seem inclined to apply a construction which will favor recovery by an insured, rejecting strict literal readings which most frequently would favor the interests of the insurance company that drafted the policy. To apply such a broad meaning to the same words in an errors and omissions policy (fraud) would defeat the underlying purpose of favoring the insured; so the court in the present case preferred to alter the result so as to preserve this purpose. This is the anomalous result of a broad meaning to the word "fraud" in a fidelity bond case and a narrow meaning when the same word is used in an errors and omissions policy." (34 WLR 245, 247).

In the case at bar, the trial judge apparently accepted appellee's contention below that "negligent acts, errors, or omissions" as used in this policy mean "negligent acts, negligent errors and negligent omissions."

We earnestly urge before this court that such a construction cannot be accepted without the violation of numerous rules of contract construction. Socratically testing the soundness of this view, why did not the scrivener *use* the words "negligent acts, negligent errors, and negligent omissions"? Too many words? Then, why not the single word "negligence"? The word "negligent" as used in the law's symbol, "negligent acts", is not a simple attributive adjective in an ordinary syntactical group but is an attributive adjective as a component of a *group word*. The expression "negligent act" denotes an act which is defined

by the several applicable principles of the law of torts. It is quite different from "error".

It is almost too obvious to warrant the attendant prolixity to say that, although when one acts negligently, in a broad sense, he may have erred, the converse is certainly not true. One may believe he is entirely justified in what he does, that he is absolutely right, and he may act most conscientiously, most painstakingly and most precisely, and still err — a fact of which, indeed, we earnestly feel the lower court's decision herein affords good illustration.

Appellee, who appeared to have been given a carte blanc by the trial judge in its preparation of proposed findings and conclusions, seemed to have abandoned its earlier position that loss resulting from breach of contract[24] was not covered. Nonetheless, appellants' present stature in this long litigation dictates certain argument for precautionary purposes. For this reason we cite, not only *Sutherland*[25], ante, but, also, *O'Toole v. Empire Motors*, 181 Wash. 130, 42 P. 2d 10, wherein a garage-keeper's liability policy expressly excepted from coverage any liability "under any agreement or contract, oral or written". The essential pleadings are set out on p. 132 of the decision. They allege an agreement of the defendant garage to do certain repairs, that he purportedly did the repairs, that after receiving the car back, the plaintiffs were driving near Lake Crescent when the right front tire blew out, causing the injury. "That the right front wheel, despite defendant's agreement

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[24]For a comprehensive discussion bearing upon whether appellant's action sounded in tort or contract, we invite the court's attention to *Compton v. Evans*, 200 Wash. 125, 93 P.2d 341.

[25]*Sutherland v. Fidelity and Casualty Co.*, 103 Wash. 583, 175 Pac. 187.

to so do, had never been aligned, but was badly out of alignment . . . " causing the tire to wear thin, etc.

When issues were joined on the garnishment proceeding against the defendant garage's carrier, the two-fold defense was (1), not within the coverage because the damage resulted from a breach of contract, and (2), collusion in obtaining the original judgment. The court, as to point (1) said, inter alia,

> "The complaint alleged negligence, either in repairing the car as agreed between the parties, or in failing to repair entirely. That was negligence in itself and the cause of the damage." p. 136.

Interestingly, nowhere in the pleadings is the word "negligence" used.

As to point (2), more pertinent to argument to follow, the court stated:

> "Appellant had the opportunity of remaining in the defense of the principal action and preventing any collusion if such were possible, which it failed to do. That being true, it cannot be heard later to question that judgment."

In *Aitchison v. Founders Ins. Co.,* 333 P2d 178, (1958, Cal.) an insurance policy rider provided:

> "(T)his policy, as respects Coverage C, . . . is amended to indemnify the insured against any claim or claims arising out of the assured's occupation as a buyer or seller of metal ores . . . which may be made against the insured *by reason of any negligent acts, errors or omissions* committed by the insured and/or employees of insured in the conduct of insured's business as stated . . . " (Emphasis ours)

Plaintiff-insured, Aitchison, sold to the General Services Administration some $20,000.00 worth of ores, he being required to certify to the agency upon sale that the ores were of domestic origin. These happened to be foregin ores that had been smuggled into the United States, wherefor they were seized and declared forfeit as smuggled property. Aitchison was relieved of the forfeiture upon paying about $6,900.00 in duties and costs. The G.S.A. demanded return of all money paid because illegally paid. In Aitchison's action to have his rights against the insurer under the policy declared, the court, after pointing out that "the trial court could not and we *cannot add* to the language of the rider *or omit* any of the language used in the rider in determining its meaning," (citing cases), stated at p. 182:

> "Applying the language of the rider to the claim of the Administration, we are convinced that the trial court correctly declared that this claim was within the coverage of the rider. The Administration's claim arose out of the error of Aitchison in selling to the Administration as tungsten of domestic origin that which was in fact foreign. Founders has not in its brief asserted that the word "error", as used in the rider is modified by the word "negligent". We must assume that Founders in writing the policy intended the word to have its ordinary meaning and that it used it to cover a hazard which was not due to a negligent act or omission. Civ. Code, Sec. 1644; *Continental Cas. Co. v. Phoenix Construction Co.*, supra, 46 Cal. 2d 423, 438, 296 P. 2d 801. In Webster's International Dictionary, second edition, the word "error" is defined as follows: "Belief in what is untrue***" and "mistake" is there given as a synonym of "error". It is undisputed here that when Aitchison sold the smuggled tungsten to the Administration he honestly

but mistakenly believed it to be domestic tungsten and had he not made this error there could have been no claim on the part of the Administration. As the transaction was in the business of Aitchison and as the claim has as its foundation his error, it clearly falls within the coverage of the policy."

C. Are Intentional Acts Excluded From Coverage?

If the trial court had correctly applied Washington law, he would not have either *found* or *concluded* that, because Pacific Farwest *intentionally* released the deed, its act in so doing was not covered. The court would have simply looked at the exclusions and plainly seen that *intentional acts are not excluded.*

The Washington court said in Hering v. St. Paul-Mercury Indemnity Co., 50 Wash. 2d 321 p. 324, 311 P.2d 673 (1957),

> "The contention of the appellant is that, inasmuch as its duty to defend is to be determined by the allegations of the complaint, it had no duty to defend this action for the reason that the complaint alleged an assault, which constitutes a criminal offense, and that public policy would be violated were it to insure against wilful criminal misconduct.
>
> The cases from other jurisdictions, cited by appellant, are cases in which the insurer insured against "accidents", and these courts held that assault is not within the definition of accident.
>
> The policy in the instant case is not an accident policy."

The most devastating answer to the argument that was accepted by the trial court is that, if intentional acts were intended not to be included in coverage,

they *would have been excluded.* Particularly should this be presumed when such exclusionary clauses are so very common. Moreover, even if there had been such an express exclusion no comfort would have been afforded appellee because it has insisted throughout that Pacific Farwest had a *legal right* to release the deed. To come within an "intentional act" exclusion in a liability policy, it is the resulting *harm* which must be intended—not the act alone. Appellee argued throughout the lower court proceedings that the policy did not cover because insured did an *intentional, deliberate, business-decision* type act. But at no time has appellee contended that the harm that resulted from the act was *intentional.* At least, to make an intentional error, or do an intentional wrong, must not the actor *know* he is committing an error or doing wrong?

Defendant's Contentions of Law number 2, of Pretrial Order (R. 68) stated that " . . . Pacific Farwest, as escrow agent, was, therefore, legally entitled to deliver the fulfillment deed to the buyer . . . " (lines 4-5) and "Pacific Farwest was not a party to the fraud of Northwestern Utilities on plaintiff . . . " (p. 13, lines 6-7 of Pretrial Order (R. 68). The Superior Court of King County *has found* that Pacific Farwest *did wrong.* Is not appellee bound to agree that, *if it did wrong*, it was not *intentional wrongdoing* —as the State court likewise held?

See Annotation in 2 A.L.R. 3rd 1238. "Liability Insurance: Specific Exclusion of Liability for Injury Intentionally Caused by Insured."

Also see 29A Am. Jur. Insurance, Sec. 1340.

In *Russfield Corporation vs. Underwriters at Lloyd's,* 164 Cal. App. 2d 83, 330 P2d 432, we read:

> "A 'wilful act' within a statute providing that the insurer is not liable for loss caused by the wilful act of the insured connotes something more blameworthy than the sort of misconduct involved in ordinary negligence and something more than the mere doing of or *intentional doing* of an act constituting negligence."

The last case cited involved a "statutory" exclusion clause.

When contractual exclusionary clauses relating to *intentional acts* are relied upon as a defense, the courts *require the insurer to sustain the burden of proving*, not that the *act* causing the damage was intentional, but that the *damage* itself was *intended.* See p. 18 of pocket part supplement to 20A Am. Jur. Insurance, Sec. 1346.

Consequently, even if the policy at bar contained a specific clause excluding from coverage harm resulting from *intentional* acts, (which exclusion is conspicuously absent), this court's disposition of appellee's contention, as accepted by the trial judge, might appropriately simulate the treatment given to "Continental's Contention No. 2" by Judge East in the case of Runyan vs. Continental Casualty Co., 233 F. Supp. 214 at p. 218 (Ore., 1964).

Appellee, obviously thus far successfully, has insisted that, not only is a covered act required to be negligent, but that it must be *inadvertent* or *accidental* in nature. (p. 17 Def. Br., R. 101). Of course, again, *it would have been simple to have so drafted the policy.*

We respectfully submit that, in the field of professional liability policies, often the risks which most demand coverage, from the *insured's* standpoint, are those that arise from the doing of *intentional* acts. The architect who intentionally and deliberately designs a building using components of certain strength believing that the structure will be safe (and let's have him consult with competent structural engineers in advance for good measure) may nonetheless be liable for his error if it turns out that the components were deficient.

The fact that an accountant may *intentionally and deliberately* advise his client to make certain stock transfers so as to derive a tax benefit, should not be a basis for avoiding coverage of losses resulting from such misadvice. *Bancroft v. Indemnity Co. of North America,* 203 F. Supp. 49 (W.D. La. 1962).

In the last cited case the court held that the words "neglect, error or omission" are very *broad* in professional liability policies.

For other helpful cases concerning the construction of professional liability policies, see the following:

Continental Casualty Co. v. Reinhardt, 247 F. Supp. 173 (D.C. Ore. 1965; aff'd 358 F2d 306, 1966)

National Surety Corp. v. Musgsove, 310 F2d 256 (CA 5, 1962)

H. L. Sogerty v. Gen. Acc. Fire and Life Assurance Corp. 48 Ca. Rptr. 37 (1965)

Cadwallader v. New Amsterdam Casualty Co., 152 A2d 484 (Pa. 1959)

Runnan v. Continental Casualty Co. 233 F Supp. 214 (Ore. 1964)

Thoresen v. Roth, 351 F2d 573 (Ca. 7, 1965)

Otteman v. Interstate Fire and Casualty Co., 111 N.W. 2d 97 (Neb. 1961)

Scott v. Potomac Ins. Co., 341 P2d 1083 (Ore. 1959)

Maier v. U.S. Fidelity and Guaranty Co., 298 P2d 391 (Colo. 1956)

Concluding this section of our argument we cite the following three cases which show that even liability for damages resulting from assault and battery are covered by a medical malpractice policy.

Physinans' and Dentists' Business Bureau v. Dray, 8 Wn. 2d 38, 111 P.2d 568;

Sommer v. New Amsterdam Casualty Co., 171 F. Supp. 84 (DC MO. ED)

Shaw v. U.S.F. and G. Co. (CA 3rd N.D. 1938) 101 F 2d 92.

D. What Is the Proper Construction of Paragraph 5 of "Provisos and Conditions"?

The first sentence of "Provisos and Conditions", paragraph 5 reads:

> "The Assured shall as *a* condition precedent to their right to be indemnified under this Certificate give to Underwriters immediate notice in writing of any claim made upon them and further, upon request, shall give to Underwriters such information as Underwriters may *reasonably require* and as may be in the Assured's power." (Emphasis ours).

The lower court's Conclusion 5, (R. 261), states:

> "The assured, Pacific Farwest Mortgage & Escrow Company, breached the provisions of Condition No. 5 of defendant's insurance Certificate in

> failing to furnish the amended complaint to defendant's counsel after being requested to do so, and in failing to furnish the documents and other information requested by defendant's counsel. Compliance with the provisions of Condition No. 5 of defendant's Certificate of Insurance is an express condition precedent to the right of the assured to be indemnified under the Certificate; and the breach of Condition No. 5 on the part of the assured, Pacific Farwest, precludes any liability of defendant to either Pacific Farwest or to plaintiffs who stand in the shoes of Pacific Farwest Mortgage & Escrow Company."

The above first quoted policy provision concerns two distinct and substantively quite distinguishable areas in the broad field of insurance policy conditions; the first, *notice of claim,* and the second, *cooperation.* Are both made express conditions precedent in this policy? The answer may or may not be important dependent upon this court's answer to questions which follow. An express condition precedent obviates the necessity of a showing that a breach was prejudicial. *Sears Roebuck & Co. v. Hartford Accident and Indemnity Company,* 50 Wn 2d, 443, 313 P. (2d) 347.

The above paragraph speaks of *a* condition precedent i.e. in the *singular,* that condition precedent being "to give immediate notice in writing of any claim" (appellee cannot dispute that *this was done* —unless it should strangely contend that the *amended complaint* gave rise to a new and different *claim*[26]), and then, separated by the word "further"—not "as a further condition precedent"—but "further" being

[26]Such a contention, if made, would be remarkably incongrous with the common practice of regarding an insurance claim as a factual report of the incident and would be utterly offensive to the modern notice pleading concept, i.e. that altering a cause of action does not change the underlying claim. (See FRCP Rule 15 (c) Relation Back of Amendments).

used disjunctively, *the* condition precedent having already been stated, we find that, additionally to the condition precedent, and further, and beyond that, the assured, *if requested*, shall give such information as may be in the assured's power and may *reasonably* be required.

If *both* of the acts described in this paragraph were intended to be conditions precedent, should not the first few words have commenced, "The Assured shall as *conditions* precedent to their right, etc"? In short, appellee's convenient interpretation, again accepted by the trial judge[27], is not sound when one applies the usual rules of language construction—much less when there is superimposed upon those rules the favoritism which established law requires be accorded to the assured.

In short, we note mention of a single condition precedent, and there then follows *two* conditions, different in substance, and the grammatical arrangement lends itself to simple and convenient disjunction.

We earnestly contend that the very most favorable view of the second clause in this sentence, from appellee's standpoint, is that it is ambiguous as to whether or not it, likewise, was intended to be a condition precedent. Unfortunately, from appellee's standpoint, that ambiguity must be resolved in favor of plaintiffs.

Deer Trail Mining Co. v. Maryland Casualty Co., 36 Wash. 46, 51, 78 Pac. 135, 136 illustrates the simple manner in which plural conditions precedent may

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[27]It will be noted that the Conclusions of Law refer to "Condition No. 5" *in toto* as being an express condition precedent.

be drafted. Actually, all that is required is an "s".

E. What Are the Purposes of Notice and Cooperation Clauses And F. When May an Insurer Avoid Liability Based upon Breaches Thereof?

Of course, no judgment should be binding upon one when it results from litigation of which that one has not had notice. At the same time, when an insurer either assumes a contractual *duty* to defend its insured, or reserves to itself the *right* to take over the defense[28], then, when it fails, or chooses not to participate, it becomes bound by the findings and judgment in that action providing it was sufficiently notified of its pendency and providing that the essential findings bring the loss within the coverage.

The district court, in its finding number 27, (R. 256) found that the insured did not give notice of the amended complaint, but by its finding 29, (R. 256) found that counsel for appellants *did* advise the insurer that an amended complaint *had been filed* and that "the charge of collusion" had been withdrawn. In its conclusion number 3, (R. 260), it held the insurer not bound by the King County judgment "because defendant was not given *proper* notice of the amended complaint", "was not *requested* to defend the amended complaint" and was not "*furnished*" the amended complaint upon request.

We urge the court to keenly note that this policy contains no "suit papers forwarding" clause. The conditions, whether both precedent or not, are only

[28]As contended by appellee, "although defendant's policy does not contain an obligation to defend Pacific Farwest (but gives Underwriters the right to defend) as do many casualty policies, the principles are the same so far as the issue of res judicata is concerned." (Def. Tr. Br. p. 2, lines 23-26, R. 88). Appellants generally agree except for discerning a logical basis for a different test as to what may be *demanded* before the insurer has elected to avail itself of its right.

two. (1) Notice of claim and (2) "The assured—shall give to Underwriters such *information* as Underwriters may *reasonably require and as may be in the Assured's power.*"

Underwriters have never disputed that they had notice of the claim. "Defendant was given notice and the opportunity to defend the original complaint." (Def. Tr. Br. p. 2, lines 11-12, R. 88).

Appellee, of course, has contended throughout that it was not in any way affected by this notice because the claim alleged was obviously not within the coverage of the policy. (How obvious will be noted later.)

Appellee's contention that in order for the earlier judgment to be res judicata, the notice of the amended complaint was required to come from the insured and such document be delivered into its hands simply is not borne out by the weight of authority.

Still bearing in mind that this policy is absent any *condition* that suit papers must be forwarded, (the frequency of use of such clauses making such absence conspicuous), we refer the court to the annotation in 18 ALR 2d 443 (supplementing earlier treatment in 76 ALR 37 and 123 ALR 953) "Liability Insurance—Clause with respect to notice of accident or claim, etc. or with respect to forwarding suit papers," Sec. 9 thereof, 458, entitled "By or through whom given."

> "The later cases support the general rule that the giving of notice of an accident or claim or the forwarding of suit papers need not be done by the insured himself but may, under certain circumstances, be attended to by other persons."

We dare say that the invitational tone of Mr. Mc-

Cormick's letter (Ex. 5) deterred the insurer from asking him for a copy of the amended complaint for fear he would promptly furnish it.

In *Lee v. Traveler's Insurance Co.*, 184 A 2d 636 (D.C. 1962) a garnishment action against the carrier to collect a judgment where the original action was not defended, and a *default* taken, the Court says at p. 637:

> "Nicholson and Herian were served by leaving copies of the summons and complaint at their usual place of abode on March 29. On May 18 appellant's (Lee, the injured party's counsel notified the insurer by telephone that suit had been filed and process had been served. The insurer replied that it had received no notice from Nicholson or Herian that they had been served with process and had not been requested by them to defend the action, and that under the circumstances it did not believe it had either the duty or the right to enter the case and therefore it did not intend to defend. Counsel for appellant offered to send to the insurer a copy of the suit papers, but his offer was refused. On the following day appellant's counsel sent a letter to the insurer notifying it that he intended to have a default entered. Ten days later default was entered. After ex parte proof verdict and judgment were entered for appellant. The garnishment proceedings followed.
>
> "The trial court ruled in favor of the insurance company on the ground that "the failure on the part of the insureds to forward the suit papers was a breach of a condition precedent and, as such, avoided any liability on the part of the garnishee under the policy of insurance." Our question is whether the trial court was correct in so ruling. We do not understand that the question of delay in reporting the accident is before

us. Although the report was accepted with a reservation, the insurer agreed to remove the reservation if the delay was not prejudicial to it, and it has made no attempt to show that it was so prejudiced. The question then is whether the insurer was relieved from liability to appellant because of the insured's failure to forward the suit papers to the insurer or otherwise communicate with it after service of process.

"The pertinent policy provisions read as follows:

> '4. Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place, and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.''

> '27. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.****'

"(1, 2) It is generally held that provisions relating to notice are of the essence of the insurance contract, and that, at least where the policy expressly makes compliance with its terms a con-

dition precedent to liability on the part of the insurer, failure to comply with the notice provision will release the insurer of liability on the policy. Annot., 18 A.L.R. 2d 443, 452. The cases so holding go no further than to say that the insurer must be given notice before it can be held liable. In the present case, while it is undisputed that the insured failed to forward the suit papers to the insurer, it is also undisputed that the insurer received notice of the accident, made an investigation and carried on settlement negotiations which were broken off when an agreement could not be reached. The reasonable inference is that the insurer was well aware of the facts and legal issues involved and of the probability that suit would be filed.

"When suit was filed and the insured failed to forward the suit papers, default was not taken without notice to the insurer. Appellant's counsel notified the insurer of the pending action and offered to furnish the insurer with copies of the suit papers; when this offer was refused appellant's counsel notified the insurer of the intention to take a default but at the same time offered to agree to extension of time the insurer required for filing an answer. It is clear the insurer had notice of the filing of the suit and was afforded full opportunity to defend. It refused, taking the stand that it was not required to defend because of the failure of the insured to forward the suit papers.

"The insurer would have us make a distinction between the policy provisions relating to notice of the accident and the forwarding of suit papers. Conceding arguendo that it may be of no importance whether notice of the accident or claim comes from the insured or from some other party, such as the person injured, the insurer argues that a stricter rule must be followed with respect to delivery of suit papers, that the insurer must receive

> the suit papers from the insured upon whom they are served and from no one else. We are unwilling to make such distinction. The two requirements have essentially the same purpose, i.e., notice to the insurer. Notice of the accident enables the insurer to make prompt investigation and prepare to defend any action that may be brought, Forwarding the suit papers gives the insurer notice that an action has been brought and enables it to properly defend."

In *Northwestern Mutual Insurance Co. v. Independence Mutual Insurance Co.*, 319 S. W. 2d 898 (Mo. 1959) wherein, as subrogee, the plaintiff carrier stood in the shoes of the insured, the question arose as to whether Northwestern's attorney's forwarding of suit papers satisfied the express condition precedent requiring the assured to immediately forward suit papers .The Missouri Court of Appeals, after stating the general law in respect to performance by an insured of conditions precedent, says:

> "Exceptions are recognized when the condition precedent is complied with by the "real party in interest", even though he be another than the insured. So, a compliance by the injured person, who is the unnamed beneficiary of a liability policy, with a condition requiring the insured to forward suit papers to the insurer will enable the beneficiary to enforce the policy, notwithstanding the failure of the insured to act. Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 6, Sec 4033; 29 Am. Jur. 818, Sec. 1090; 45 C.J.S. Insurance, Sec. 1051, p. 1276; 76 A.L.R. 38; 123 A.L.R. 954; *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S. Ct. 510, 85 L. Ed. 826; Royal Indemnity Co. v. Morris, 9 Cir., 37 F 2d 90; *Metropolitan Cas. Ins. Co. of New York v. Colthurst,* 9 Cir., 36 F 2d 559; *Slavens v. Standard Accident Insurance Co. of Detroit, Mich.,* 9

> Cir. 27 F. 2d 859; *Bachman v. Independence Indemnity Co.*, 112 Cal. App. 465, 297 P. 110, 298 P. 57; *Hartford Accident and Indemnity Co. v. Randall,* 125 Ohio St. 581, 183 N.E. 433; *Morris v. Bender,* 317 Pa. 533, 177 A. 776; *McClellan v. Madonti,* 313 Pa. 515, 169 A. 760; *Butler v. Eureka Security Fire & Marine Ins. Co.* 21 Tenn. App. 97, 105 S.W. 2d 523; *Jameson v. Farmers Mutual Automobile Ins. Co.,* 181 Kan 120, 309 P. 2d 394; *Simmons v. Iowa Mut. Cas. Co.,* 3 Ill. 2d 318, 121 N.E. 2d 509; Appleman, Insurance Law and Practice, Vol. 8, Sec. 4738, 4740. McKinnon was a beneficiary of the liability policy and a real party in interest, and so is his subrogee, so that compliance by Northwestern's attorney with the condition precedent of the policy requiring that the suit papers be forwarded immediately to the insurer would be sufficient to entitle it to maintain this proceeding, regardless of the failure of insured to comply with the condition."

The liberality of the Washington Court is illustrated by *Dowell v. United Pac. Casualty Co.,* 191 Wash. 666, 72 P.2d 296 where *oral* notice to an insurance agent satisfied the policy condition of "written notice."

In the case at bar, the district judge appeared to treat as of *no significance* whatsoever, the fact that Ex 5 *notified* the insurer of an amended complaint, *as well as its import*, more than five months *prior to trial* of the state court action and almost *nine months* before any judgment was entered.

Quite remarkably, and those words are used with thoughtful and respectful hesitance, the trial judge stated in his decision from the bench.

> "This court is unable to distinguish the facts in this case from those involved in the case of *Suss-*

man v. American Surety Company, 345 F. 2d 679 . . . ''

In the cited case, Rachel Sussman sued Mario Algiers, Inc. a beauty salon, alleging injury sustained by her while she was receiving a shampoo when a washbasin lid fell on her head.

The policy contained this coverage exclusion:

> ''It is agreed that . . . the policy does not apply to injury, sickness, disease or destruction due to the rendering of or failure to render any . . . *cosmetic services or treatment.*''

Attorneys for American Surety nonetheless *did* appear and, after investigating the claim, they concluded that under the exclusion American Surety had no duty to defend. They *moved for leave to withdraw as defense counsel* for Mario and their motion was granted.

Ten days later, without any notice to the company or its attorneys, an amended complaint was filed wherein it was alleged that defective equipment and improper maintenance caused plaintiff's injuries. Mario failed to answer and Mrs. Sussman took a $17,000.00. judgment by default. In the cited case, collection of the default judgment from the carrier was attempted.

We most respectfully insist that the Sussman facts are glaringly distinguishable because the *very fact* which was determinative of Sussman is absent here, i.e. that, in Sussman, the insurer's attorneys were utterly *without* notice and *without* knowledge of the amended complaint whereas in the instant case the insurer's attorneys *clearly had notice and had knowl-*

edge. In Sussman there was a "behind-the-back" default judgment 10 days after the amendment —which certainly was compatible with collusion. In appellant's case, judgment was entered almost nine months after the amendment and after a hard fought "tooth and claw," extended trial, appellant's counsel having even invited the carrier to discuss the matter at the time notice of the amendment was given.

In the cited case, Judge Wisdom's decision concludes, page 680,

> "It is uncontroverted that American Surety had *no knowledge* of the amended complaint and of the proceedings until after the default judgment was rendered.
>
> "Since American Surety was *neither notified of the amended complaint nor given any opportunity to participate in the defense* it cannot be required to pay Sussman in the amount of the State Court judgment against Mario." (Emphasis ours.) *Sussman v. American Surety,* 345 F. 2d 679 (CA 5, 1965).

In its oral decision,[29] in addition to the authority of Sussman, the lower court also found to be "in harmony" the Washington case of *Lawrence vs. Northwest Casualty Co.,* 50 W. 2d 282, 311 P. 2d 670. The facts of that case simply do not fit the case at bar and we do not have the slightest quarrel with it because, upon disquisitive analysis, it *supports* our position. It

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[29]Of course, under the Findings and Conclusions signed by the Court herein, everything it discussed in its oral opinion became unnecessary and meaningless because, irrespective of however proper had been the notice of and the forwarding of the amended complaint by the insured, the allegations of the amended complaint did not come within the coverage of the policy anyway. This is so, of course, because the court held that "intentional" acts, although nowhere in the policy excluded, are not "negligent acts, errors or omissions".

was *conceded* therein that the insurer *was responsible* for attorney's fees and the costs of the defense *after* the amended complaint was filed, despite the fact that nowhere, either in the written decision, or in the appellate briefs, is it shown whether notice of the amended complaint was even given.

Concerning Sussman, it is interesting to note that the Fifth Circuit was applying the law of Florida— and, for that matter, could have been applying the law of *any* state and would have been compelled to reach the same result. When the same circuit later considered Florida law on different facts it is shown that the liberality, which modernly favors the insured, exists in Florida as elsewhere. *Glenn Falls Ins. Co. v. Gray,* 386 F. 2d 520 (CA 5th, Fla. 1967).

Cooperation clauses are for the purpose of (1) preventing collusion and (2) for enabling an insurer to properly defend an action — *after it has undertaken the defense.* 8 Appleman, Insurance Law and Practice (1942 Ed., p. 99).

See, 70 A.L.R. 2d, 1197, "Liability Insurance-Cooperation."

We respectfully invite the court's attention to the June 1966 article by Paul Pretzel entitled "What Price Cooperation?" which appears in 521 Insurance Law Journal 325.

This court indicated the second purpose of a cooperation clause when it stated, in *Indemnity Insurance Company v. Forrest,* 44 F. 2d, 465 (CA 9th, Cal., 1930), that although the insured had breached the cooperation clause in the policy, still the insurer, having refused to defend the insured, was "now in no posi-

tion to claim that he failed to cooperate or assist in a defense that was never made."

Which brings us to our next section of argument.

F. When May an Insurer Avoid Liability Based on Its Insured's Failure to Cooperate or to Give Notice?

Before discussing the several circumstances under which an insurer will be held to have waived its right to insist upon strict performance of policy conditions. let us again note the pattern of the factual background. Here, the insurer made absolutely clear to the insured that "intentional acts" were not covered from the moment of the first conversation that took place between the insured's and the insurer's respective counsel on January 6, 1965.

True, the allegation of collusion was also stated as a reason, but whether collusion had or had not been alleged, the allegations of the complaint made it clear that insured had intentionally released the deed despite requests not to so do.

This being so, insured's counsel could be expected by the insurer, to certainly consider that its earlier denial of coverage in no way would be affected by a subsequent deletion of any allegation of collusion where the operative facts remained unchanged. The insurer had a month to consider these suit papers before that conversation. Mr. Yates had every right to regard this as a *considered* opinion. Again, more than another five weeks later, the same determination to deny coverage for the identical two reasons was put in writing. Mr. Yates did not respond. Why should he have (although by this time the collusion allegation had been deleted) — when the other reason given still

remained? As Yates testified,

> "and I knew those pleadings didn't change the complexion as far as it related to the intentional act, and they would still have the same position." (Tr. 85, ll. 14-17).

Let us review the tests applied by the courts when determining the validity and efficacy of the insurer's reliance upon breach by the insured of such conditions.

First, does the particular condition under scrutiny meet the test of an express condition precedent? If it does, then the breach need not be shown to have been prejudicial. If the particular condition fails the test, then no prejudice need be shown.

Second, whether condition precedent or not, was there in fact a breach of this specific condition? And, if so, was it material?

Third, if a breach in fact occurred, did the insurer make diligent efforts to avoid its occurrence?

Fourth, did the insurer waive the performance of the condition by its denial of liability on some other ground that was subsequently adjudicated to have been untenable?

The stage upon which these tests are conducted has as its floor a continuing favoritism of the insured in both interpretation and burden. The tests are conducted by the courts who first candidly announce that they will conduct these tests fairly but in the light of a firmly established procedure which requires them to resolve any doubt in the favor of the policy's "purchased" purpose of affording coverage.

What of the case at bar?

The tests above enumerated have been gleaned from the decisions of many courts. To start citing cases at this point for those general propositions of law would only pose when to stop. Those hereinafter cited in support of the specific concepts will incidentally furnish ample authority.

(1) Whether the second clause of the first sentence of Provisos and Conditions number 5 of the policy is an express condition precedent has heretofore been considered.

(2) Was there a breach of either the requirement of notice of claim or *giving information* upon request Appellee concedes notice and service of the original complaint. It insists it may avoid liability on the judgment because, applying the same test that would be applied if there were a *duty* to defend, it would not have been required to defend the original complaint because of the "collusion" allegation. Even this basic position is subject to question. The original compaint's allegation, which is sought to bring it within the exclusion of 6(b) of the policy, i.e., "dishonesty," reads (albeit, perhaps from the draftsman's error), as follows:

> "That, in fact, *prior to* and *subsequent to the transaction* involving plaintiffs' land, the defendant, Pacific Farwest Mortgage and Escrow Co., has been acting in collusion with the defendant, Northwestern Utilities."

Would not the painstaking strictness of construction required in an insured's behalf dictate a holding that no dishonest acts had been alleged as having been committed by insured *during the transaction* which was the subject of suit? If the court should so in-

terpret this language, we are sure that appellee would concede it is bound by the state court judgment except for its position on the coverage question.

Moreover, it would seem as though there is no presently existing law of Washington which should today accord with the earlier cases[30] holding that the cause of action pleaded determines the insurer's *duty* to defend. First, it is to be noted that Lloyds accorded to itself only a *right* and no duty. More importantly, it should be noticed that the Supreme Court of Washington State adopted court rules substantially the same as those of the Federal Courts as embodied in the Federal Rules of Civil Procedure, which state court rules became effective on January 1, 1960 (FRCP. Rule 43 permits judicial notice). It may be, therefore, that this court should exercise a "prophetic" determination of what the Washington Court would hold today in the light of its adoption of "notice pleading."

We respectfully submit that the case of *Milliken v. Fidelity and Casualty Co.* (CA 10, Kan.) 338 F. 2d 35, may afford an excellent precedent.

The Circuit Court, in part quoting the Supreme Court, at p. 40, says:

> "Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. * * * 'It is therefore apparent that the underlying reason or

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[30] *Town of Tieton v. General Ins. Co. of America*, 61 Wn.(2d) 716, 380 P.2d 127, appears to be the most recent example.

> basis for the Kansas rule on the duty to defend, i.e., the necessity of pleading facts, is not present when the action is brought in federal court. . . . . This court has consistently held that as a general rule the duty of an insurer to defend its insured in federal court litigation is determined in the beginning of the litigation by the coverage afforded by the policy, as compared with the allegations of the complaint filed in the action. But, the allegations of the complaint are not conclusive of the issue. The duty to defend may attach at some later stage of the litigation if the issues of the case are so changed or enlarged as to come within the policy coverage. The reason for this rule is that ' * * * (u)nder the Federal Rules of Civil procedure the dimensions of a lawsuit are not determined by the pleadings because the pleadings are not a rigid and unchangeable blueprint of the rights of the parties. * * * ' Thus, the insurer's duty to defend an action brought in federal court against its insured may arise or attach at any stage in the litigation. And the duty does attach where there are facts, extraneous to the allegations of the pleadings, which, if proved, make out a case against the insurer that is covered by the policy and which either are actually brought to the insurer's attention or could have been discovered by it through a reasonable investigation."

Also, the general rule is that where the facts alleged create only a potential coverage, the duty to defend exists. As stated in *London Guarantee and Acc. Co. v. C. B. White Bros.*, 49 S.E. 2d 254 (1948),

> "While the duty to defend is, in the first instance, to be determined by the allegations of the notice of motion, yet if those allegations leave it in doubt whether the case alleged is covered by the policy, the refusal of the insurance company to defend is at its own risk; and if it turns

> out on development of the case that the case is covered by the policy, the insurance company is necessarily liable for breach of its covenant to defend."

Or, if the allegations are both within and without coverage the duty likewise exists. *Globe Navigation Co. v. Maryland Casualty Co.,* 39 Wash. 299, 81 P. 826.

Too, if "collusion" is regarded as a "conclusion" of the pleader, the insurer would be required to look beyond the pleadings. *Alm v. Hartford Fire Insurance Co.,* 369 P. 2d 216; *Mueller v. Winston Bros. Co.,* 165 Wash. 130, 4 P. 2d 854; *Yeager v. Dunnavan,* 26 Wn. 2d 559, 174 P. 2d 755; *Hein v. Chrysler Corp.,* 45 Wn. 2d 586, 595, 277 P. 2d 708.

In argument to follow, it will be assumed, arguendo, that the second clause of the first sentence of Condition 5 is a condition precedent.

Materiality.

In order to avail itself of a breach of a condition precedent, it is almost universally held that the breach must be material and substantial. *State Farm Mutual Automobile Ins. Co. v. Palmer,* 237 F. 2d 887 (CA 9th 1956); *Chronister v. State Farm Mutual Automobile Ins. Co.,* 353 P. 2d 1059 (N. Mex. 1960); *Fontenat v. Lloyds Casualty Insurer,* 31 So. 2d 290 (La. 1947); *Nicholai v. Transcontinental Ins. Co.,* 61 Wn. 2d 295, 378 P. 2d 287; *Indemnity Co. of No. Am. v. Forrest,* 44 F. 2d 465 (CA 9th Cal., 1930).

The first cited case involved an express condition precedent, about the legal effect of which there was a void of applicable Arizona law on the precise question

of whether a non-prejudicial breach may be an escape for the carrier. After pointing out the wide divergence of opinion among the jurisdictions[31] as to whether or not prejudice is necessary in order to enable an insurance company to avoid liability based upon failure to cooperate, this court went on to state at 892,

> "But *all cases and authorities* appear to be in agreement that the non-cooperation must have been material." Citing *Standard Acc. Ins. Co. v. Winget,* 197 F. 2d 97, 103; 29 Am Jur, Insurance, Sec. 789, p. 600 and Sec. 795, p. 602.

In *Chronister v. State Farm Mutual Ins. Co.,* 353 P. 2d 1059, (N. Mex. 1960), it is said:

> "The great weight of authority holds that to constitute a breach of a cooperation clause by the insured, there must be a lack of cooperation in some substantial and material respect."

This Circuit, applying Washington law, said, in *Hansen & Rowland v. Fidelity Deposit Co.,* 72 F. 2d 151, at 157 (CA 9th Wash. 1934):

> "And even as to material facts, the insurer may waive his right to disclosure by his neglect to make inquiries as to data 'concerning which he has been distinctly put on inquiry by the facts stated.'"

Denial of Liability as Waiver

In section 3 of the annotation in 70 ALR 2d, 1197, at 1201, it is stated:

> "It has been held that an insurer which dis-

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[31]No case is cited so as to categorize Washington in either of the divergent schools. Concededly, it is in the school which does not require prejudice if, by clear language, a particular condition is expressly made a condition precedent.

> claims liability under an automobile liability insurance policy for a reason other than the insured's non-cooperation, and refuses to defend the insured, cannot thereafter assert, in defense to an action on the policy, the insured's breach of the cooperation clause in the policy by conduct occurring after the insurer's disclaimer of liability."

See, 8 Appleman, Insurance Law and Practice, Sec. 4786.

In *Ranallo v. Hinman Bros.,* (1942, D.C. Ohio) 49 F. Supp. 920, aff'd. *Buckeye Union Casualty Co. v. Ranallo* (CA 6th Ohio) 135 F. 2d 921; cert. denied 320 U.S. 745, 88 L. Ed. 442, 64 S.Ct. 47, the district court stated,

> "The evidence is clear that notice of loss as provided in the policy was given the Buckeye Union Casualty Co. as required in the policy. The insurer (the Buckeye Union Casualty Co.) in its letter of April 17, 1941 (Plaintiff's Ex. 3), to the insured, wrote:
>
> > 'In other words, the Buckeye Union Casualty Co. does not assume any responsibility for the above captioned accident and does not agree to pay any kind of judgment rendered in the above numbered case. . . . '
>
> "That letter indicated such finality of decision that any other communication or notice by the insured was a useless gesture, thoroughly meaningless and vain."

Where waiver by denial of liability or coverage is involved, it is not necessary that the denial be express or unequivocal, it being sufficient that the facts and circumstances warrant the inference that liability was or would be denied. *Otterman v. Interstate Fire &*

Casualty Co., 111 N.W. 2d 97 (Neb. 1961); *Am. Fire and Casualty Co. v. Kaplan*, 183 A. 2d 914 (D.C. 1962). Also see: *Pappadakis v. Netherlands Fire Ins. Co.*, 137 Wash. 430, 242 Pac. 641 (1926); *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 Pac. 941 (1907); *Pagni v. New York Life Ins. Co.*, 173 Wash. 322, 23 P. 2d 6 (1933).

Diligence.

Illustrative of the very high degree of diligence required of any insurer to procure the cooperation of the insured before breach of a cooperation clause may be relied upon are the following cases: *State Farm Mutual Ins. Co. v. Farmers*, 387 P. 2d 825 (Ore. 1963); *Carpenter v. Superior Court*, 422 P. 2d 129 (Ariz. 1967); *Iowa Home Mutual Cas. Co. v. Fulkerson*, 255 F. 2d 242 (CA 10, Wyo. 1958); *Mareum v. State Auto Mut. Ins. Co.*, 59 S.E. 2d 433 (W. Va., 1950); *Employers Mutual Cas. Co. v. Ainsworth*, 164 So. 2d 412 (Miss. 1964).

Why such strict requirements? Why do the courts require the insurer to make such a substantial showing of diligence to secure cooperation of the insured? The explanation of the Supreme Court of Oregon bears repeating:

> "The motivation of an insurer and an insured may be very different from the motivation of the parties to the usual contract. In the usual contract it is to the promisee's benefit and advantage to have the promisor perform his contractual duties. If there is any indication that the promisor is not going to perform, the promisee will exert great effort to secure performance. If performance is not secured, the benefit the promisee hoped to gain from entering into the contract is lost. There is no need to impose a legal duty on the promisee

to use diligence to secure the promisor's performance; the economics of the bargain provide ample incentive. The only legal duty that must be inferred, if it is not expressed in the contract, is the duty to notify the promisor that the contractual prerequisites upon which his performance was conditioned have now occurred.

"In an insurance contract the benefit to the promiseee, the insurer, may be gained in exactly the opposite manner from that existent in the usual contract, i.e., the insurer benefits if the promisor *fails* to perform. If the promisor, the insured, fails to perform his duty to cooperate, the promisee gains the ultimate benefit; it does not have to pay a loss. There is no economic incentive for the insurer to expend any effort to secure the insured's performance.

"The promisor-insured's motivation may also be very different from that of the usual contractual promisor. The usual promisor hopes to gain a benefit or avoid a detriment by performing. Again, the economics of the bargain usually provide enough incentive to guarantee performance and, if this is insufficient, the financial consequences of a breach of contract supply an additional goad.

"This motivation is usually wholly lacking when difficulty is encountered in securing the cooperation of an insured. Insureds, when uncooperative, usually become so because they cannot see how their cooperation would benefit either themselves or their insurance company. If the insured was a witness to the accident and believes that on trial he will be found to be at fault, he may see no reason why he should be at the trial. If he was not a witness to the accident, he likewise may see no reason why he should be at the trial. Regardless of his attitude about the above matters, if the insured is judgment proof, he may see no pecuniary benefit accruing to him from at-

tending the trial. The type of person most likely to be indifferent to his duties under the insurance contract is frequently the type of person least likely to be concerned about a judgment being obtained against him.

Law or Fact.

In *Massachusetts Mutual Life Ins. Co. v. Mayo,* 81 F. 2d 661 (CA 9th Wash. 1936), this court held that the questions of waiver and estoppel were questions of law for the court. And see *Thompson v. Ezzell,* 61 Wn. 2d 685, 379 P. 2d 983.

Before leaving this subject of non-cooperation, might we not once more carefully read the language, i.e., "*The Assured . . . upon request*, shall give to Underwriters such information as Underwriters *reasonably require* and as may be *in the Assured's* power."

Here, *no request* was ever made of the *assured,* Pacific Farwest, the corporate insured. The letters of inquiry, wherein certain pleadings and documents were requested, were all addressed to Yates and Yates, attorneys. We dare say that the insurer's counsel crossed his fingers and hoped his fellow-counsel might be too busy to answer. None were addressed to Mr. Yates as an *officer* of the corporate insured, if the latter indeed remembered that he was. Mr. DeCrane Cooke was obviously the office manager and the insurer knew or should have known from his application, which forms a part of the policy, that he was the experienced escrow man. Admittedly, the insurer was told by letter from its own sub-agent to get any additional information from Mr. Cooke. Did not a modicum of diligence demand acceptance of the invitation contained in Ex. 5? Could the insurer *reason-*

ably require Mr. Yates, a busy attorney, and not its assured, to do its leg work for it at *Mr. Yate's expense?*[32]—particularly, after having *denied coverage* to that attorney's client?

Under abundant law, the insurer here fell woefully short of proving the diligent effort required of it in order to rely upon a breach of this cooperation clause.

Burden.

> "In an action upon an accident insurance policy, the burden which the injured plaintiff assumes is to show that injury or death was due to accidental or other means specified in the policy. But on the defendant insurer rests the duty to show that the injury or death was caused by some act which is made an exception to the risk in the policy, or that the policy has been avoided by reason of a breach of some condition precedent, or that the action was not brought within the time required by the policy. *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 83 ac. 113, 4 L.R.A. (N.S.) 636; *Wallin v. Massachusetts Bonding & Ins. Co.*, 152 Wash. 272, 277 Pac. 999; *Bjorklund v. Continental Casualty Co.*, 161 Wash. 340, 297 Pac. 155; *Selover v. Aetna Life Ins. Co.*, 180 Wash. 236, 38 P. (2d) 1059; *Hill v. Great Northern Life Insurance Co.*, 186 Wash. 167, 57 P2d 405."

G. May the Insurer Re-litigate the Issue of its Insured's Liability to Appellant?

Appellants earnestly submit that the insurer is bound by the findings and judgment entered against

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[32]See Proviso and Condition number 2.

its insured escrow agent in the Superior Court of King County, Washington, if

(1) it had notice of the proceedings and an opportunity to make the choice unequivocally reserved to itself by Proviso and Condition 2.

(2) if the insured did not breach the conditions of the certificate of insurance, or if a breach occurred, then, if the insurer waived the same.

(3) if the facts essential to the state court judgment were such as to constitute a loss within the coverage of the policy.

If appellee in this action had the right to and the opportunity to appear in the earlier action to defend or aid in the defense against the claim, and chose not to so do, then the judgment, as well as any findings essential to the judgment, are binding upon it. *East v. Fields*, 42 Wn. 2d 924, 259 P. 2d 639; *O'Toole v. Empire Motors, Inc.*, 181 Wash. 130, 42 P. 2d 10; *Johnson v. McGilchrist*, 174 Wash. 178, 24 P. 2d 607; *Brown v. Underwriters at Lloyd's*, 53 Wn. 2d 142, 332 P. 2d 228; 1 Freeman Judgments (5th ed.) 978, Sec. 447; 30 Am. Jur. 969, Sec. 237; Restatement, Judgments 511, Sec. 107.

Only the third point above requires further comment.

Appellee has contended throughout that the state court's finding of *negligence* on the part of Pacific Farwest is not binding on the question of policy coverage. Arguendo, only, let us agree.

However, we just as vigorously argue that any fact

that must necessarily have been found in order to support the judgment *is binding* on appellee. Manifestly, it was necessary that the Court have found it was *not right* for Pacific Farwest to have released the deed. Obviously, even if it had not been characterized at all, it still would have been *implicit* in the judgment against Pacific Farwest that it had committed an error " in or about the conduct of ... business conducted by ... (it) ... in their (sic) professional capacity as Escrow Agents." It had to be *either* a breach of contract, or a breach of contract sounding in tort, or pure tort. (It could have been done criminally or fraudulently but both parties agree it was not.) Now, whether one says the insured omitted to avail itself of its right to interplead, or, as a reasonably prudent escrow, it should have foreseen the hazard to plaintiffs, or that it simply acted in breach of its agreement of escrow, it remains that *it was in error* in releasing the deed, and, insofar as it was in error in releasing the deed, that obvious and implicit finding is binding and, if being in error in releasing the deed calls for coverage, it is conclusive of that issue.

If it were important to appellant's position, however, that Pacific Farwest's acts be characterized specifically according to legal concepts, we would not lightly concede that the specific findings of negligence and breach of contract are not binding upon appellee. It will be observed (Ex. 4) that this was a case against multiple defendants whose respective individual conduct was so interrelated that it became the very essence of the litigation to determine the role played by each defendant and to categorize that role into its appropriate legal slot. In days gone by it would have been said that the action against the main actor, Northwestern, being an action in equity, the Court

was entitled to treat the action in toto as being primarily of equitable cognizance. Today we have one form of action but, when called for, all of the concepts of equity still apply. The trial judge's task in state court was to effect justice between all of the parties, and his decision concerning the role played by each and the basis of their respective rights and liabilities was in no way a decision on matters incidental to or collateral to the judgment but thereto most essential.

And see, *Johnson v. McGilchrist,* 174 Wash. 178, 24 P. 2d 607; *O'Toole v. Empire Motors,* 181 Wash. 130, 42 P. 2d 10.

SECTION II

In connection with part 1 of specification of error IV, that portion of Finding of Fact 20 (R. 254) is objectionable because of the court's use of the word "likelihood" in the first sentence thereof. The president of Pacific Farwest, in answer to the inquiry of counsel for appellee whether the witness " . . . understood that there was a distinct *possibility* . . . " (emphasis added) that Pacific Farwest would be sued, replied "Yes" (Tr. 175). See also (Tr. 198). The use of the word "likelihood" and the following use in that same sentence of the words "intentionally and wilfully" might suggest that Pacific Farwest intended harmful consequences in its act of releasing the deed. This is not borne out by the evidence, nor by the consistent position taken throughout by appellee. As heretofore noted, the appellee has maintained that Pacific Farwest was correct in releasing the deed, and it is clear from the record that Pacific Farwest believed that it was legally justified (Tr. 167-168) in so doing, as likewise, apparently did its attorney, Mr.

Yates (Tr. 156-157). The second and last sentence of the criticized portion of Finding of Fact 20, in view of the issues framed in this case, must be determined to be a conclusion of law and not a finding of fact.

Part 2 of specification IV, Finding of Fact 22 (R. 255), has heretofore been discussed.

Part 3 of specification IV, Finding of Fact 25 (R. 256 is significantly incomplete in its omission to set forth *both* reasons announced in the carrier's letter (Ex. A-22), as the basis for declining coverage.

Part 4 of specification IV, dealing with the last portion of Finding of Fact 30 (R. 257) first sets forth a statement constituting a conclusion of law. It has been heretofore argued, both that the policy in question is absent a "suit forwarding clause" and, further, that the proviso appearing immediately above the objectionable portion of this Finding of Fact 30, contains a single condition precedent, i.e., notice of claim, compliance with which is not in dispute. This objectionable sentence *presupposes* that a sufficient effort had been made by the insurer to obtain what was requested and the authorities cited herein do not warrant such a conclusion. A further objection to the entire sentence stems from appellant's position that the insurer waived all of these so-called requests by declining coverage on an *untenable ground*, i.e., that the intentional act of releasing the deed is not covered by the subject policy. The second sentence of this finding is also objectionable because of its inclusion and placement of the words "... determination ... intentional decision ...," which might suggest that the thinking of Mr. Yates was to *obstruct* the insurer as opposed to the clear evidence that he saw no useful

purpose to be served by complying with Mr. Moss's letter of May 24, 1965 (Ex. A-26) because Mr. Moss had indicated that coverage would not be allowed because of the *intentional* nature of the act involved, that is, the conscious act of releasing the deed, and that the elimination of the allegation of collusion did nothing to change this objection on their part (Tr. 85, 87, 92).

In connection with part 5 of specification IV, it is first to be noted that every portion of finding No. 31 (R. 257-258) to which objection is made deals with matters which took place *subsequent* to the trial in the King County Superior Court action, specifically after the trial judge had orally announced his decision to find in favor of plaintiffs, Kienle against several of the defendants in the action, including the defendant Pacific Farwest. Many of these found facts are in conflict with the testimony, and irrespective of this, it is submitted that these recitals are of no consequence in view of the fact that they pertain to a period of time after the trial in the state court, well beyond a time when the appellee-insurer should have used such efforts to gain these papers and information.

Parts 6 and 7 of specification IV deal with Findings of Fact numbered 32 and 33, respectively (R. 258-259) and again contain statements which were in sharp conflict with the testimony. These findings likewise pertain to matters which may have occurred long after the proverbial horse "got out of the barn" and, in view of the applicable law pertaining to this case, are neither material nor relevant herein.

Finally, part 7 of specification IV deals with Finding of Fact No. 41 (R. 259-260) and, in view of the issues framed herein, amounts to a conclusion of law.

It completely presupposes that the findings and judgment of the state court action are not binding on this insurer.

SECTION III. The Court Erred in Denying Appellants' Motion for Summary Judgment.

The *material* factual issues in this case were not in dispute.

Throughout this litigation both sides have contended that, upon the admitted facts, this case should be decided as a matter of law. Cross-motions for summary judgment were made. These motions were denied. A trial was declared necessary because

> "(T)he court finds, concludes and decides that here there are one or more genuine issues as to material facts, one of which facts is as to whether the policy provisions insure against the acts of the defendant[33] complained of by the plaintiff." (Tr., Aug. 11, 1967 Pro., p. 2, ll. 2-6).

Actually, *appellee* attempted to point out to the trial court that "(T)he issue of policy coverage is essentially one of law."

The trial which followed was viewed by both sides as largely a "mock" trial wherein already existing agreed facts were put into the form of trial evidence. At its conclusion, the trial judge ruled

> "that the defendants are not bound by the state court judgment" because "the insured . . . (1) did not give notice to defendant insurers of the amended complaint which was based on a new cause of action, and (2) the insured did not fur-

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[33]Obviously, the court meant the defendant in the earlier action.

> nish the suit papers in the state court action to which papers, under the policy provisions, the defendants were entitled and did request copies of without success." (R. 239, ll. 21-25).

Certainly, no trial was necessary to reach this result, because it is dependent (although we insist erroneously) only upon facts of which there was no real dispute.

Then, later, when Findings and Conclusions were entered, they, in effect, eviscerated the oral opinion so that it became completely unnecessary to a decision. That is so because the court has now found that, no matter how correct had been the notice given — no matter how strictly had been the compliance with conditions — the admitted fact that the deed was *intentionally* released from escrow barred any recovery.

We respectfully suggest that it was just such procedural patterns as this which inspired Professor James Wm. Moore to state on p. 2284, 6 Moore Federal Practice,

> "A difficult question of law does not . . . warrant the denial of a motion for summary judgment, subject to the following important qualifications: that the *material* factual issues are not in dispute and furnish an adequate basis for the application of the proper legal principles. In this event nothing is to be gained by a denial of the motion, for resolution of the question does not become easier through a process of postponement."

Hesitancy and judicial reserve in the use of FRCP Rule 56 is desirable and commendable. At the same time, we respectfully suggest that fear of its use should not be allowed to atrophy its salutary role in the judicial scheme. Was not the instant case quite

tailored for its application? Insurance liability avoidance cases perhaps lend themselves, more than most other cases, to this procedural timesaver. Here, it is difficult to see wherein "*conflicting inferences*" could have been drawn on matters *material* to the judgment. *Thompson v. Ezzell,* 61 Wn. 2d 685, 379 P. 2d 983.

The court, we earnestly feel, was once again in error in denying appellants' Motion for New Trial and Amendment of Findings.

Appellants' counsel are quite mindful of the propriety, under the decisions of this court, of the trial judge delegating to counsel the task of *preparing* the Findings of Fact and Conclusions of Law, although the same practice is strongly disapproved in other circuits.[34] *Simons v. Davidson Brick Co.,* 106 F. 2d 518 (CA 9th 1939); *U.S. v. Cornish,* 348 F. 2d 175, 181 (CA 9th 1965).

However, in a case involving so many interdependent legal concepts, for prevailing counsel to possess the prescience to know exactly how the trial court would rule on all of these points of law without being told in advance, must pique one's curiosity.

Appellee's memorandum, resisting this post-trial motion of appellants, explains that this was what the judge ruled, i.e., that he had concluded his oral decision by finding the issues in favor of the defendant (R. 276, referring to the oral opinion at R. 241). Of course, this still called for enough prescience to know

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[34]Roberts v. Ross, 344 F.2d 747 (CA 3rd 1965) at 751-752. In *Chicopee Mwg. Corp. v. Kendall Co.,* 288 F.2d, 719 (1961) the court states at 724, that "The manner in which the opinion of the district judge was prepared in this case cannot be approved."

that the judge did not want to rule on the issue of indemnity versus liability which had occupied a good deal of time throughout the litigation.

Appellants' counsel may have been guilty of naivete, but earnestly represent to this court that they were truly misled by the trial court stating, less than three weeks earlier, with no uncertainty, that

> "That is what the court decides (orally announced decision) and nothing else." (Tr., Part 2, Aug. 11, 1967, proceedings, p. 5, ll. 23-25).

It was for this reason that appellants, after service upon them of the voluminous findings and conclusions proposed by appellee, prepared their own proopsed set confining them to only the points the court had decided — accompanying the same with a statement of purpose.

Upon presentation, appellants were not prepared to properly make their objections to all of the findings and conclusions dealing with points upon which they had every reason to believe had not been decided by the court.

Especially should appellants' counsel have so believed when it is so well settled that it is not necessary for a court to decide *every* issue presented to him when those that he *has decided* are sufficiently *determinative* of the case. *Parker v. St. Sure,* 53 F. 2d 706, 708 (CA 9th Cal. 1931); *Klimkiewicz v. Westminster Deposit Co.,* 122 F. 2d 957 (CA, DC, 1941). And as stated in *Matton Oil Transfer Corp. v. The Dynamic,* 123 F. 2d 999, 1001 (CA 2nd N.Y. ED 1941), findings should be

> "brief and pertinent"..."rather than the de-

> layed, argumentative, overdetailed documents prepared by winning counsel. . . . "

Or as the court says in *Petterson Lighterage Corp. v. N.Y. Central*, 126 F. 2d 992, 996 (CA 2d 1942),

> "Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law."

SECTION IV

CONCLUSION

Perhaps the potential of harm to members of the public in the area of escrow transactions is less grave than that which has prompted widespread enactment of automobile financial responsibility or compulsory liability insurance laws. Certainly the experiences of loss are far fewer — but individual losses, as here, may be substantially greater. Those concerned with the interest of the public and the security of the individual citizen should abhor the thought that the appellant's plight should befall anyone and that one be without recourse. We earnestly submit that there are public policy considerations involved in viewing this tri-partite transaction comprised of the victim, the insured escrow, and the insurer. Established institutions such as banks or title insurance companies are rarely ever unable to respond to the damaged party whose injury is traceable to their mistakes. But of late there has emerged a new business, often called a mortgage-escrow company who proclaims to the public "Have no fear — an insurer is near." Various methods are employed to convey to the public at large this inviting assurance — in this instance at least by

the use of the words "Bonded and Insured" at the bottom of the escrow's stationery.

What do we see when we look into each side of this prism? The member of the public at least feels more secure knowing that he is dealing with an insured escrow. The escrow has that for which he bargained, a more confident client, who as a member of the public, has certainly made no such investigation as an insurer might be expected to make upon an insurance application, in respect to the solvency of the company or the personal judgments of its principals.

When we look through the prism's third side we see an insurer with a world-wide reputation for solvency and financial integrity who is quite aware of the image it has created and is quite pleased with the financial profit derived from this image — and is quite aware that for a premium it has sold a portion of this image to the escrow.

In short, we see a picture which strongly suggests that such insurer at least be required to use some modicum of care to see to it that the public is not misled.

The liability policy here very easily could have provided that, in the case of a loss arising out of a pre-claim conflict between the parties, the insurance would be ineffective unless the parties were interpleaded in a declaratory judgment action. That it did not, is the fault of the insurer, and none other.

Understandably, courts should be concerned with the possibility of collusion between injured and insured. Here, the facts utterly scream out against any

such inference. Quite as subject to scrutiny by the courts will be the insurer's role in such a situation as here presented. An *insolvent* stands to gain nothing from cooperating with his insurer and is not likely to be overly concerned with the liability of the insurer. When the resultant indifference is brought to the attention of the insurer should not the courts subject the insurer's letter writing activities to a most exacting scrutiny? How earnest and sincere can the insurer be in its quest for information when it bypasses the invitation of the injured party's attorney who, it well knows, will be panicked into a flurry of breach-healing activity at the slightest suggestion that the insured is not cooperating? The insurer, here, was not attempting to *produce cooperation* by its letters but was attempting to *produce a synthetic defense.*

One who "whispers for help in the darkness" should not be heard to later complain that no one responded to his whisper.

Respectfully submitted,

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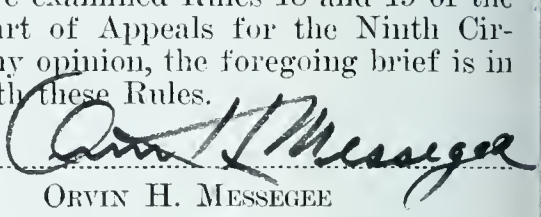
CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these Rules.



ORVIN H. MESSEGEE

JEREMIAH M. MCCORMICK

Appendices

APPENDIX A

PLAINTIFFS' EXHIBITS

No.	Document	Page of Transcript where Offered	Admitted
1.	Certificate of Insurance.	16	18
2.	Judgment & Decree, Cause No. 630 691.	18	19
3.	Amended Complaint, Cause No. 630 691.	19	19
4.	Findings && Conclusions of Law No. 630 691.	20	20
5.	Letter from Jeremiah M. McCormick to Gordon W. Moss, dated May 20, 1965.	21	21
7.	Letter dated December 1, 1964 to Wood Ins. from Pacific Farwest Mortgage & Escrow	21	21
8.	Letter dated ct. 26, 1964 to Howard R. Kienle from Pacific Farwest Mortgage & Escrow	27	29
9.	Letter date 12/5/1964, to Voight-Walker & Co. from Wood Ins. Co.	105	106

DEFENDANTS' EXHIBITS

No.	Document	Page of Transcript where Offered	Admitted
A- 2.	Sellers' Escrow Instruction	148	149
A- 7.	Letter dated July 17, 1964 from attorney Gouge to Pacific Farwest.	142	146
A- 8.	Letter dated July 23, 1964 from attorney Carpenter to Pacific Farwest	142	146

DEFENDANT'S EXHIBITS (Continued)

No.	Document	Page of Transcript where Offered	Admitted
A- 9.	Letter dated 7/28/64 from attorney Youngberg to DeCrane Cooke of Pacific Farwest	164	165
A-13.	Mortgage to Pacific Farwest from Northwestern Utilities, dated 8/18/64.	176	177
A-19.	Letter dated Aug. 20, 1964, from Pacific Farwest to Fidelity Savings & Loan Ass'n.	178	179
A-20.	Complaint, Cause No. 630 691.	67	70
A-21.	Copy of letter from Yates & Yates, dated 12/7/64 to Voight-Walker & Co.	67	70
A-22.	Letter from Gordon W. Moss, dated 2/15/65 to Yates & Yates.	60	60
A-26.	Letter from Gordon W. Moss, dated 5/24/65 to Yates & Yates.	61	63
A-27.	Letter from Gordon W. Moss, dated 12/1/65 to Leslie M. Yates	95	97
A-28.	Letter from Gordon W. Moss, dated 5/18/66 to Leslie M. Yates.	95	97
A-29.	Oral Opinion, Cause No. 630 691.	206	209
A-30.	Original Indemnity Agreement.	201	202
A-31.	Promissory Note dated 8/19/64.	203	204

APPENDIX B

ESCROW AGENTS' INDEMNITY FORM

WHEREAS the person or persons whose name is/ are mentioned in the schedule herein carrying on business under the firm and style in the said schedule (hereinafter called "the Assured", which expression shall include the aforesaid person or persons and any other person or persons who may at any time and from time to time during the subsistence of this Certificate be a partner therein or any one or more of them) have made a written proposal bearing the date stated in the said Schedule and containing particulars and statements which it is hereby agreed are the basis of this Certificate and a copy of which is attached hereto and made a part hereof and have paid the premium stated herein, Underwriters in consideration of the foregoing do hereby agree to indemnify the Assured, to the extent provided herein and subject to the terms and conditions hereof, against liability and costs in respect to any claim or claims which may be made against the Assured during the subsistence of this Certificate by reason of any negligent act, error or omission whenever or wherever the same was or may have been committed or alleged to have been committed on the part of the Assured or their predecessors in business or any person now or heretofore employed by the Assured or their predecessors in business or hereafter to be employed by the Assured during the subsistence of this Certificate in or about the conduct of any business conducted by or on behalf of the Assured or their predecessors in business only in their professional capacity as Escrow Agents'.

SCHEDULE

Name and style of the Assured: Pacific Farwest Mortgage & Escrow Co.

Addres or addresses of the Assured. 2525-6th Avenue, Seattle, Washington.

Date of the Proposal: March 12, 1964.
The sum insured under this Certificate: $100,000.00.

PROVISOS AND CONDITIONS

1. The liability of Underwriters hereunder shall not exceed in the aggregate for all claims under this Certificate the sum stated in the said Schedule (hereinafter referred to as "The Sum Insured") except that Underwriters will pay costs as herein provided ,subject to the conditions herein express ed).

2. Underwriters, if they so desire, shall be entitled at their own expense to take over and conduct in the name of the Assured the defense or settlement of any claim.

Attached to and forming part of Certificate No. 18201.

Issued to: Pacific Farwest Motrgage & Escrow Co.

Dated: March 30, 1964.

3. In the event of Underwriters requiring any claim to be contested by the Assured, Underwriters will pay all costs, charges and expenses in connection therewith, subject nevertheless to the following conditions:

   (A) If the claim is successfully resisted by the Assured, Underwriters will pay all costs, charges and expenses incurred by the Assured in connection therewith up to but not exceeding the sum insured.

   (B) If a payment has to be made to dispose of a claim in excess of the sum insured, Underwriters' liability to pay any costs, charges and expenses in connection therewith shall be limited to such proportion of the said costs,

charges and expenses as the sum insured bears to the amount paid to dispose of the claim.

4. There shall be no liability hereunder in respect of any claim or claims for which the Assured is entitled to any indemnity under any other policy in force previous hereto as a result of the Assured, before the commencement of this Certificate, having givent written notice to the Insurers on such other policy attaching such claim or claims to such previous policy in manner hereinafter provided.

5. The Assured shall as a condition precedent to their right to be indemnified under this Certificate give to Underwriters immediate notice in writing of any claim made upon them and further, upon request, shall give to Underwriters such information as Underwriters may reasonably require and as may be in the Assured's power.

   If during the currency hereof:

   (A) The Assured shall receive written notice from any third party that it is the intention of such third party to hold the Assured responsible for the results of any specified alleged negligent act, error or omission; or

   (B) The Assured shall become aware of any occurrence which may subsequently give rise to a claim being made against them in respect of any alleged negligent act, error or omission;

   and shall in either case during the currency hereof give written notice to Underwriters of the receipt of such written notice under clause (A) or of such occurrence under clause (B) then any claim which may subsequently be made against the Assured arising out of such alleged negligent act, error or omission, shall for the purpose of this insurance be treated as a claim made during the currency hereof.

6. This Certificate does not extend to indemnify the Assured in respect of any claim:

   (A) For libel or slander; or

   (B) Brought about or contributed to by the dishonesty of the Assured or any of their employees; or

   (C) Based upon or arising out of an Act of Congress of the United States of America known as the "Securities Act of 1933", approved May 27, 1933, or any amendment thereof or addition thereto; or

   (D) Based upon or arising out of any opinion of title on real estate rendered or furnished by the Assured or by any predecessor of the Assured.

ENDORSEMENT #1

In consideration of the premium paid hereon, it is understood and agreed that no liability shall attach to Underwriters in respect of the first $500.00 (Five Hundred Dollars) of each claim.

All other terms and conditions remain unchanged.

Attached to and forming part of Certificate No. 18201 of the Underwriters at Lloyd's, London.

Issued to: Pacific Farwest Mortgage & Escrow Co.
Effective date: March 16, 1964.

VOIGHT-WALKER & CO., INC.

APPENDIX C

(Under FRCP, Rule 43 this court may judicially notice Statutes of Washington).

PERTINENT PORTIONS OF WASHINGTON STATUTES

By statutes in Washington, RCW 48.01.040, "insurance" is thus defined: "Insurance is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies."

R.C.W. 48.01.030: "PUBLIC INTEREST. The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, and their representatives rest the duty of preserving inviolate the integrity of insurance."

R.C.W. 48.18.200 LIMITING ACTIONS, JURISDICTIONS.

(1) No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation or agreement

(a) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country . . ."

R.C.W. 4.72.010 provides: "The superior court in which a judgment of final order has been rendered, or made, shall have the power to vacate or modify such judgment or order: . . .", if such application is

made within one year from date of entry, (R.C.W. 4.72.020)

R.C.W. 4.32.240 provides: "The Court may . . . relieve a party . . . from judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect",

R.C.W. 48.18.190: "POLICY MUST CONTAIN ENTIRE CONTRACT. No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy."

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224/66